

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**Marymount Manhattan College
Employer**

- and -

Case No. 2-RC-23151

**New York State United Teachers,
American Federation of Teachers, AFL-CIO
Petitioner**

DECISION AND DIRECTION OF ELECTION

Marymount Manhattan College (“the Employer”) is a small, private, non-profit college located on Manhattan’s upper Eastside. New York State United Teachers, American Federation of Teachers, AFL-CIO (“Petitioner”) filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, (“the Act”) seeking to represent a unit of all employees employed by the Employer, excluding all faculty and adjunct faculty, field maintenance employees,¹ guards and supervisors, as defined in the Act.

Upon a petition filed under Section 9(b) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter² and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated and I find that the Employer is a private, non-profit college with a principal office located at 221 East 71st Street, New York, New York. Annually, the Employer receives gross annual revenues from all sources of

¹ The field maintenance employees appear to be employed by Aramark which is an independent contractor performing some of the facilities maintenance work for the Employer.

² The briefs filed by the parties have been duly considered.

at least \$1 million, of which at least \$50,000 was received from points outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated and I find that New York State United Teachers, American Federation of Teachers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. In its petition, Petitioner sought to represent all full-time and regular part-time professional and non-professional employees at Marymount Manhattan College, excluding all full-time and part-time faculty, field maintenance employees, guards and supervisors as defined in the Act.³

As evidenced at the hearing and in the briefs, the parties disagree on the scope and the eligibility of certain classifications included in an appropriate unit. Petitioner seeks a unit comprised of all full-time and part-time professional and nonprofessional employees.⁴ Essentially, the petitioned-for unit is the remnants of prior organizing drives and seeks all (approximately 122) unrepresented employees college-wide, which is a presumptively appropriate unit.

With respect to scope, the Employer claims that the staff employees working in academic departments do not share a community of interest with the staff assigned to the business office. In addition, the Employer asserts that within the non-professional classifications, the petitioned-for unit is inappropriate because the custodial staff should be excluded as lacking a community of interest with the staff in either the academic departments or the business office.⁵ With respect to the professionals, the Employer argues that those who carry out the Employer's academic mission do not share a community of interest with the professionals engaged in the Employer's administrative and financial operations. Finally, the Employer, contrary to Petitioner, claims that the three tutors working at the Bedford Hills program, which is part of the Employer's "special programs" department, do

³ After some equivocation at the outset of the hearing, Petitioner affirmed that it is seeking the unit as set forth in the petition.

⁴ As discussed more fully in the Eligibility section, the parties stipulated that certain regular part-time employees, such as, dance technique instructors, have accreted into the existing certified adjunct faculty bargaining unit.

⁵ While the record indicates that the mechanics employed by the Employer are represented by Local 30, Operating Engineers, I note that no petition is pending seeking to include the custodians in that unit.

not share a community of interest with the employees who work on the upper Eastside campus.

Regarding unit eligibility, the record indicates that fifty-four titles are in issue with the Employer claiming exclusions based on managerial and/or supervisory and/or confidential status. As to unit placement, the parties disagree with respect to the professional status of certain individuals.

I have considered the evidence and the arguments presented by the parties on each of these related issues. As discussed below, I find that the petitioned for unit is appropriate. Apart from the resident directors and clinic director Linda Carozza, all other classifications are employees and therefore, eligible to vote.

To provide a context for my discussion of those issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

I. Scope of the Unit

A. The Campus

The Employer is an urban, undergraduate liberal arts college. With a small population of about 2,000 students, the "campus" consists of two adjoining buildings at East 71st and 72nd Streets, and three residence halls for students and faculty, located on East 47th, 55th, and 92nd Streets in New York City.

With the exception of a few employees working at the Bedford Hills prison program, the geographic area used by the staff in the petitioned-for unit is limited to the two adjoined buildings on the upper Eastside. The main building ("Main") houses classrooms, administration and faculty offices, studios for art, theater and dance, computer workstations and science labs. In addition, Main contains the Ruth Smadbeck Communication and Learning Center which consists of a speech-language pathology and audiology clinic, as well as, academic access program. The writing center is also located in Main and it includes a literary library, publications, audio video archives and a number of writing carrels with personal computers. Finally, the chapel, the art gallery, the cafeteria and a formal meeting and reception space are also found in the Main building.

Like Main, Nugent houses classrooms, administration and faculty offices, as well as, several centers, the library and the fine and performing arts (FAPA) program. The Center for Academic Advancement provides tutoring and courses for students with ESL or developmental needs. The Thomas J. Shanahan Library/Media Center covers the second and third floors. The FAPA program utilizes a dance studio, a theater space, theater office, green room, costume shop, etc. Finally, a student lounge, the WMMC Radio and WMMC-TV are also located in Nugent.

Accordingly, while employee transfers are unusual, the evidence indicates that the academic departments are interspersed with the administrative offices throughout the two buildings. In such a limited geographical area, employee interactions are common, especially in the lounges, cafeteria, coffee shop and other common areas.

B. Functional Integration

In addition to the geographic proximity of the petitioned-for unit, the Center for student services is emblematic of the overall integration of the Employer's operations. The director of student financial services, Maria De Innocentiis, explained that the employees in the Center interact with the staff "throughout the whole college."

The Employer designed the Center for student services to provide "one-stop shopping" for many of the students' needs by combining several offices in one location - academic advisement, financial aid, registration, records and career development. The counselors in academic advisement assist students in making appropriate academic choices by providing individual guidance on selecting a course of study. The academic advisement counselors regularly consult with the financial aid counselors to explore a student's financial options. The registration clerks ensure that students timely register for courses and the career development counselors help students obtain internships or part-time employment related to their chosen major. Accordingly, the Center for student services carries out a variety of transactions ranging from consultation with an academic counselor to clarify program requirements, to meeting with the custodian of records to verify internship documentation. Moreover, the combined efforts of academic advisement (student affairs division) and financial aid/records clerks (administration and finance division) dovetail with the larger institutional goal of increasing student retention.

As another example of functional integration, Dawn Weber, vice president of academic affairs, described the interdependence of the academic and business divisions. Specifically, in determining whether the Employer could meet the requirements for becoming a recipient site of international study abroad students, Weber involved the wider administrative departments in the evaluation process. The project entailed coordination and input from all of the academic departments, student housing, the Center for Academic Advancement, student affairs, the registrar's office, admissions and student accounts. Accordingly, the record demonstrates that a purely "academic" program could only be launched in conjunction with the business/administrative departments.

The collaborative nature of the work was emphasized by assistant dean, Judith Slisz, at a recent staff meeting. For librarian Mary Brown, the Dean's remarks conveyed that the employees who handle the paperwork at the college

are still achieving the mission of academe. Commonality among the staff is also evidenced by the standard use of “colleague” which is the institutional software system.

Throughout the testimonial evidence, the overlap between the academic departments and the business division is persistent and obvious. The employees in academic departments regularly interact with personnel in non-academic departments, such as, human resources, payroll, admissions, financial aid, IT, student affairs and the division of institutional advancement. The myriad of committees mentioned on the record evidence a highly integrated workplace. Michael Cappeto, vice president for enrollment and student affairs, testified that he is active on the IT and library committee because information technology is front and center in the academic programs. “We’re such a small place that we know one another.”

C. Same Benefits

All hiring, promotions and terminations are processed through the human resources department.⁶ The employee handbook setting forth all of the policies and procedures applies uniformly to all employees.

All full-time employees, except faculty, are compensated based on a system of sixteen pay grades with five smaller increases within each grade. All full-time employees are eligible for the same fringe benefits. All part-time employees, except adjuncts, are paid on an hourly basis and their total hours cannot exceed 19.5 hours per week. Both full-time and part-time employees receive annual cost of living increases. Full-time employees are additionally eligible for merit increases based on the recommendation of their immediate supervisor and final approval from the vice-president of each division.

D. Community of Interest Among the Non-Professional Employees

As an alternative argument, the Employer specifically objects to the inclusion of the custodians and claims that this group lacks a community of interest with the rest of the non-professional petitioned-for unit.

The record demonstrates that three matrons and one night porter are employed directly by the Employer in the campus cleaning department. The matrons perform routine rounds throughout the campus’ two adjoined buildings. They have a series of rooms that are cleaned in a set sequence every day and their duties include stocking the bathrooms and picking up trash from the cafeteria, classrooms and lounges. The night porter performs heavy duty

⁶ While the Bedford Hills program has additional requirements in the hiring process, these employees are nonetheless covered by the Employer’s human resources policies and procedures.

cleaning, such as buffing the floors and collecting the garbage for the nightly pick up. He also receives cleaning supply deliveries and assists with snow removal.⁷

Director of facilities, Michael “Dom” Lavin, is employed by Aramark and oversees the facilities operations at the campus and the dormitory located on 55th Street. Lavin reports to Paul Ciraulo, vice president for administration and finance.

While the matrons’ and night porter’s immediate supervisors are Aramark employees, the record is clear that the custodians are paid directly by the Employer and receive the same benefits as other full-time employees, including health insurance, vacation, sick time and pension benefits. The custodians are a Grade 4, which is the same grade level as the data entry clerk and the mailroom coordinator. The custodians are evaluated in accordance with the forms and procedures used for all full-time employees and their appraisals are reviewed by the human resources department.

Lavin testified that the Employer entered into a collective-bargaining agreement with Local 30, Operating Engineers covering a unit of mechanics in the building and grounds department. Whether the mechanics also work at the residence halls was not discussed on the record. In fact, no record evidence was adduced regarding their terms and conditions of employment nor was the collective-bargaining agreement offered in evidence.

The matrons and porter use an optical recognition time clock system to “punch” in and out for their shift and lunch. The security staff also is required to use this system which is located in the basement in the vicinity of the locker rooms. The matrons and the porter are required to wear uniforms; whether the mechanics are required to wear uniforms and punch the clock was not explored on the record.

E. Community of Interest Among Professional Employees

As a second alternative argument, the Employer claims that “academic” professionals do not share a community of interest with the business office professionals. In the professional group, the Employer specifically objects to the inclusion of the librarians, the clinical director of Smadbeck Center (Linda Carozza) and the audiologists, and the assistant director of academic access (Jacquelyn Bonomo) and the learning specialists, because it claims that these employees have direct teaching functions at the college.⁸

The overall integration among the professionals is readily demonstrated on the record. Both Dawn Weber, the vice president of academic affairs, and Mary

⁷ Lavin discussed these duties as applicable to all of the “cleaners at night,” however, it appears that the other night cleaners are employed by Aramark.

⁸ I note that no petition is pending seeking to represent these employees as adjunct faculty.

Fleisher, the divisional chair in FAPA, testified that the professionals in the academic affairs division routinely interact with the business office professionals. Moreover, the record indicates that the job functions of the disputed professionals are distinguishable from the work performed in faculty and adjunct faculty units.

Unlike the faculty, the librarians are not required to publish and are not eligible for tenure. More importantly, the librarians do not teach, except as guest speakers.⁹ The record demonstrates that the college offers first year students a writing program with two levels. "Writing I" is expository writing and "Writing II" is research-based writing. Librarians are invited as guest speakers for one session of the semester-long course to teach the students how to utilize all of the resources available at the library in conducting research. The librarians do not grade or evaluate the students. Hurwitz and the librarians also prepare and present an information literacy lecture to a variety of classes. For preparation, the librarians review the syllabus for the particular course and attempt to relate their lesson to the relevant area of study. The librarians do not grade or test the students on their lecture which usually covers one or two class periods.

The Ruth Smadbeck Communication and Learning Center ("Learning Center") offers health services, free-of-charge, to individuals with communication disorders. The Employer argues that Linda Carozza, the clinic director, along with the part-time audiologists share a greater community of interest with the faculty unit because they teach.¹⁰ While the record demonstrates that Carozza coordinates and supervises the clinical training of students, the part-time audiologists have a mentoring role for students on administering client care, such as, demonstrating techniques to resolve client health issues and keeping log notes. Although the audiologists give students feedback on their performance, as reflected in her appraisal, Carozza is fully responsible for the student clinicians.

Regarding integration, while some of the clients are recruited from a nearby public school and a neighborhood nursing home, the Center also provides services to students and the staff. In that regard, Carozza has expanded the Learning Center's visibility as a resource to the entire Marymount community by engaging in outreach initiatives and developing links with programs, such as, academic access and the counseling center. Carozza regularly consults with the theater department regarding students who are referred for speech enhancement services. Accordingly, the record demonstrates that the Center provides services across interdisciplinary lines, and thereby, strengthens the links among the professionals.

The learning specialists are also housed in the Learning Center. The Employer claims that Jacquelyn Bonomo and the other learning specialists are

⁹ Hurwitz and Brown teach credit-bearing courses as members of the adjunct faculty; the record is clear that their adjunct teaching duties are separate and apart from the requirements of their library positions.

¹⁰ The Employer also claims that Carozza should be excluded from the unit because she is a manager and/or supervisor which are discussed below in the Eligibility section.

tutors and, as such, they should be accreted to the adjunct faculty unit.¹¹ Briefly, the academic access program is a support program for learning disabled students. The director is Ann Jabon; Bonomo works part-time as the assistant director. Four learning specialists (including Bonomo) work regular, part-time schedules and are licensed in special education. Learning specialists work with disabled students throughout the semester on study skills, test preparation, writing development and reading comprehension. Tutors, on the other hand, work with students on a discrete project or paper. Learning specialists earn \$41.60 per hour; whereas, tutors are paid a maximum of \$21.67 per hour. The academic access program costs an additional \$2,000 per student, per semester for devising and implementing individualized learning programs for qualifying students. In contrast, the center for academic advancement offers a drop-in service, free-of-charge to the student body at large. The record indicates overall integration of the learning specialists with the other classifications in the petitioned-for unit because they work in the same area as the audiologists and perform counseling of the program students that is similar to the counseling provided by the counselors in the office of academic advisement.

F. The Bedford Hills Program

Finally, the Employer argues that because the tutors and the secretary in the Bedford Hills program work off-campus, they do not share a community of interest with the petitioned-for unit employees.

The Bedford Hills Correctional facility, located about thirty-five miles north of Manhattan, is a maximum security prison for women. Initially, the prison college program was funded through a single grant, but over time, a non-profit organization was formed and the program is now funded through grants which are administered by the Employer. While a consortium of colleges participate in the program, the Employer not only provides professors, it is the degree granting institution.

Currently, director Aileen Baumgartner and coordinator Jane Maher jointly administer the program and devise the curriculum. They report to executive director for special programs Cindy Mercer, who answers directly to Dawn Weber, vice president of academic affairs. The staff working at Bedford Hills consists of adjunct professors, two tutors and a secretary.¹²

As a pre-condition of hire, all employees must be approved by the department of corrections which entails a complete criminal history check, a test for tuberculosis and an orientation regarding the rules and regulations of the

¹¹ The Employer also claims that Bonomo should be excluded from the unit because she is a manager and/or supervisor which is discussed below in the Eligibility section.

¹² Baumgarten hired another tutor on the budget line approved for the secretarial position because she could not find an adequate clerical. Accordingly, the record suggests that the secretarial position no longer exists. The record does not disclose whether the tutors also work at the Manhattan campus.

prison. Also, all employees who are not hired directly by the prison are assigned to a corrections employee, who supervises compliance with prison facility rules.

After an interview with Baumgarten and Maher, the applicant must be approved by Mercer. Director of Human Resources, Tina Flanagan, provides an orientation to new hires because they may be entitled to certain benefits and are covered by rules set forth in the Employer's staff handbook. Once hired, Maher and Baumgarten assign the schedule and direct the work of the tutors and the secretary. Because it is a maximum security prison, getting into the school building requires passing through elaborate security procedures. Also for security reasons, Ada Perez, the prison superintendent, reserves the right to immediately terminate any employees for breach of the prison's rules.

II. Eligibility Issues

The Office of the President consists of the president, Dr. Judson Shaver, and the senior vice-president, Maureen Grant, both of whom have confidential assistants.¹³ Five divisions, each headed by a vice-president, report directly to Grant and Shaver.¹⁴ Set forth below is summary of the composition of the five divisions: Academic Affairs, Institutional Advancement, Student Affairs and Enrollment, Administration and Finance and Institutional Research.

A. Academic Affairs Division

- The Office of Academic Affairs

Dawn Weber, vice-president of academic affairs and dean of the college, is responsible for all of the academic programs and academic support programs. Two associate deans are stipulated supervisors and one administrative assistant is a stipulated confidential employee based on record evidence regarding her access to personnel information. The other three administrative assistants were stipulated as included in the unit.

The only employee in dispute in the office of academic affairs is Elaine Vukov, director of summer and winter programs and study abroad, whom the Employer claims is managerial and professional. Vukov was hired to fill the recently created director of summer and winter programs and study abroad position. The position description requires a Masters' degree, three years experience with program development, familiarity with NYC resources, and work or study abroad experience.

With respect to the summer/winter program, Vukov works with faculty to identify, develop, and schedule courses that would interest students over the winter and summer breaks. For the study abroad program, Vukov develops,

¹³ The parties stipulated that the assistants are confidential employees excluded from the unit.

¹⁴ The parties stipulated that the vice-presidents are managerial employees excluded from the unit.

markets, and advertises the study abroad program and updated the guidelines that students are required to meet in order to participate in the programs. Vukov created two pamphlets describing the programs for which she hired a photographer and met with an advertising agency. She also worked with representatives at other international universities to create articulation agreements. At the direction of Weber, Vukov researched whether the Employer can become the recipient of international, short-term study abroad students. Vukov's report identified the issues and made recommendations. Vukov reports directly to Weber and is a grade 12.

Four departments comprise the academic division. The following supervisors/managers report directly to Weber and they are: Donna Hurwitz, director of the library; Denise Ward, associate dean of continuing education, Cindy Mercer, executive director of special programs; and five, full-time faculty who serve as departmental chairs in the academic programs.¹⁵

- *Library*

The director of the library, Donna Hurwitz, is a faculty member and a stipulated supervisor, who oversees a staff of seven full-time librarians and two part-time employees. Work-study students are also employed part-time in the library.¹⁶ The Employer objects to the inclusion of the librarians on community of interest grounds, as discussed in section I, Scope. The Employer further objects to the inclusion of the circulation supervisor, David Fults and the director of the media center, Jordan Horsley because it argues that they are supervisors.

With respect to the nineteen student aides who work part-time, the hiring prerequisite is primarily receipt of financial aid through the work-study program. In that regard, during a staff meeting, the librarians made a list of student aides who were eligible for rehire for the following semester - meaning all those students who did not graduate. Hurwitz has reprimanded students for minor infractions, however, no evidence was adduced regarding termination of students for cause. Student aides self-select their work assignment which is either the circulation desk or the media center. While the students report to specific librarians for direction, the librarians are not held responsible for the unsatisfactory work of the student aide. Hurwitz decides which students aides will be hired and rehired for another semester.

David Fults starts his shift as the circulation supervisor in the afternoon. His responsibilities include checking in and out all library materials, ordering and processing new books and keeping the stacks orderly and properly organized. To

¹⁵ I am referring to the departments by the names shown on the payroll printout contained in Employer Exhibit 60 and Employer Exhibit 382B and C.

¹⁶ The parties stipulated that work-study students, like the musicians or technicians hired for a specific performance, are casual employees and therefore, excluded from the unit.

that end, Fults monitors the student aides to ensure that they are correctly shelving books.

Of the librarians, Fults appears to have the most interaction with student aides. Fults conducts the hiring interviews in which he inquires about eligibility for financial aid, availability, and any prior customer service experience. Fults must verify the financial aid status of student aides prior to sending their information onto Hurwitz. He devises the student aides' schedules which conform to their class schedule. He maintains a sign in/sign out book from which the students' time sheets are submitted. Fults trains the student aides on how to use the library's software system, basic check-out procedures and the security system. He maintains a "task list" at the circulation desk so that any student aide on duty can complete routine tasks, such as, updating customer information, affixing library bar codes to books, affixing tattle tape to periodicals, and receiving and shelving returned books.

Jordan Horsley is the director of the media center. In addition to Gene Robles, the part-time media specialist, approximately seven, part-time student aides report to the media center. As the director, Horsley is responsible for maintaining media items on reserve and operating communications technologies and audio-visual materials, including projection equipment, televisions, and laptops used in classroom lectures. One of the main functions of the media center is to deliver and set up various media items in the classrooms at the request of faculty.

Like Fults, Horsley interviews student aides for hire in order to confirm that they are receiving financial aid, notes availability and inquires as to any prior work experience. Horsley creates and maintains a schedule for the student aides working in the media center. He trains student aides on the software system and instructs them on the protocol for delivering equipment to the classrooms.

While the evidence indicates that Horsley is responsible for maintaining the budget of the student aide staff, no specific examples were adduced on the record. The only example of a recommendation regarding media equipment upgrades was Horsley's request that tube televisions be replaced with flat screens. Portions of Horsley's appraisal depend on his ability to manage, train, and develop employees, even though the work consists primarily of delivering equipment to classrooms. Similarly, while Horsley is appraised on his ability to assess his employees' strengths and weaknesses and assign duties to them, the work is routine. On one occasion, Horsley advised a student aide regarding attendance and copied the e-mail to Hurwitz; however, the record does not more fully develop this incident.

- Continuing Education

Adult Education is headed by associate dean Denise Ward. The parties stipulated that the clerk and administrative secretary are included in the unit.

- *Special Programs*

The executive director for special programs is Cindy Mercer. The assistant director for the Center for Academic Advancement is Debra Kelly. They are both stipulated supervisors.

The Center for Academic Advancement conducts placement testing and tutoring for students. There are three classes of tutors: professional tutors require a masters degree (currently eight part-time employees), master tutors hold a bachelors degree (currently one to three part-time employees) and peer tutors, who are students. The parties stipulated that the professional and masters tutors have accreted into the adjunct unit and that the peer tutors are excluded due to the casual nature of their employment. The only employee in issue in the Center is the secretarial position currently occupied by Ana Leyva. Mercer testified that Leyva oversees the daily scheduling and student requests for tutoring in the Center. Leyva tutors in Spanish and shares a desk with the other tutors. She is a grade 7.¹⁷

Blanca Vega is the director of the HEOP programs and a stipulated supervisor. Full-time HEOP counselor/coordinator, Kevin Smith was stipulated as included in the unit as a professional employee.

Eileen Baumgarten is the director of the Bedford Hills program and a stipulated supervisor. She oversees the tutors and secretary at the Bedford Hills prison program. The Employer objects to their inclusion on community of interest grounds, as discussed in the section I, Scope, however, it has not objected on eligibility grounds.

- *Academic Programs*

A variety of departments and programs comprise the academic program. Full-time faculty members serve as chairs who report directly to Weber and they are: Mary Fleisher, fine and performing arts; David Linton, humanities; Kent Worcester, social sciences, Eileen Tynan, accounting and business management and Ann Jablon, sciences. The chairs make tenure decisions and are responsible for the general oversight of the faculty, the overall curriculum within their area, and the departmental budget. In general, the chairs have full-time administrative assistants and some departments may have additional support staff.

¹⁷ The parties did not reach a stipulation regarding her position. It appears that she is a dual function employee who serves both as a clerical and a tutor. The evidence regarding the amount of time that she spends as a clerical as opposed to her tutoring duties is unknown. Accordingly, I find that she is included in the petitioned-for unit.

- Fine and Performing Arts (FAPA) -

FAPA is the largest department and consists of twenty-six, full-time faculty, nearly ninety adjunct professors and about twenty-five part-time staff, including musical theater accompanists, dance accompanists and vocal coaches.¹⁸ The department also employs about 60-70 students on a part-time basis. The department heads for theater, art and dance report to FAPA chair Mary Fleisher, who is also serving as the department chair for the theater department.

Theater Department:

Under Fleisher, Rob Dutiele is a full-time faculty member and the technical director of the theater. He coordinates all of the theatrical technical crews. Dutiele works closely with carpenter/electrician Peter Fry, who is a regular, part-time employee whom the parties have stipulated as included in the unit. The “back of the house” for productions is comprised of Dutiele, Fry, scenic designer, Ray Recht, and costume designer, Kirche Zeile. They work with students to build sets, rig equipment and construct costumes. The two employees in the theater department in dispute are: operations director of the FAPA facilities, Ross Chappell and administrative secretary, Shana Richter.

In an effort to increase his wages from grade level 8 to grade level 9, Ross Chappell re-wrote his job description at a time when the Employer had hired an outside consultant to perform salary reviews. Notwithstanding this paper authority, Mary Fleisher, a faculty member for nearly thirty years, division chair and chair of department, provided a clearer perspective as Chappell’s direct supervisor based on first-hand observation of his duties and responsibilities.

Essentially, Chappell’s job is the maintenance and functioning of theater space, which includes scheduling and coordinating rehearsals, classes and performances. He also conducts an orientation, creates the schedules and signs off on time sheets for the work-study student workers. In addition, he performs various tasks at Fleisher’s direction, such as obtaining quotes from vendors for the repair or upgrade of theater equipment, like the installation of new soundproof doors.

With respect to the ratio of supervisors to employees, as stated above, the supervisory structure in the theater department includes Fleisher, technical director Rob Dutiele, scenic designer Ray Recht, and costume designer Kirche Zeile. Part-time staff and students report to these supervisors.

¹⁸ The parties stipulated that the following classifications would be accreted to the certified adjunct faculty unit: first session adjunct faculty (dance technique instructors), tutors and accompanists, but excluding guest lecturers, performers, musicians, accompanists, theater and dance professionals or technicians hired for a performance. The exclusions were based on the casual nature of the work.

In the theater office, two students assist with routine clerical tasks, such as, answering the phones, filing and copying. In a small, busy office, Chappell's strength is ensuring a smooth work flow. Both administrative assistant, Shana Richer and Ross Chappell direct the students by prioritizing copying jobs. Similarly, Chappell instructs students that when taking reservations, the caller's name and number, date of performance and number of tickets must be read back and confirmed. Chappell "assigns" students to answer the phone based on their natural propensity to interface with the public. For the more detail-oriented type, Chappell directs the student to file syllabi. Chappell recruited students to assist him in cleaning out closets in order to create space for scenery storage. With respect to student's time sheets, Fleisher was clear that Chappell was given special permission to initial student time sheets so that the information is timely relayed to the business office. Chappell does not have the authority to initial any other documents in the theater department on Fleisher's behalf. Chappell does not have authority to adjust pay disputes. His involvement is limited to e-mailing Christian Rubio in payroll to verify time sheet information.

Fleisher unequivocally stated that hiring authority is hers alone. She offers the job to the applicant and discusses salary without Chappell's involvement.¹⁹ Given the close quarters in the department and Fleisher's desire to retain Chappell, she includes him in the interview process for the administrative secretary position. On occasion, she has asked the technical director, another administrative assistant and even students to relay their reactions and make recommendations on possible hires. Chappell does not conduct interviews without Fleisher. Notably, Chappell does not play any role in hiring accompanists.²⁰ While Chappell completes the paperwork for independent contractors, Fleisher signs the contract, the payroll authorization and determines the wages. This is the same practice used in the dance department with administrative assistant Jennifer Spenner merely submitting the paperwork to dance chair Katie Langan for hiring and paying dance accompanists or any other part-time staff.²¹

Regarding managerial duties, Chappell assists Fleisher with a periodic review of departmental spending on work-study students and independent contractors by preparing a basic accounting. The record is clear however, that the decision to spend and how much to spend rests exclusively with Fleisher who is also solely responsible for any budget deficits. Chappell's input in policy decisions is limited to commonsense prohibitions, such as, no water allowed in the theater and no street shoes on the dance studio floor. Chappell has asked

¹⁹ Contrary to the testimony of a former human resources representative, Chappell affirmatively denied that he offered an administrative assistant a job.

²⁰ While the record contains some evidence regarding the hiring of technical director Rob Dutiele and his assistant Peter Frye, Chappell's role was unclear. In that regard, the decisions to hire were unanimous and both of these candidates had prior work experience with the Employer. Chappell played no role in the hire of a theater history professor or an acting teacher.

²¹ The parties stipulated that Spenner is included in the unit.

the faculty to e-mail requests for space usage so that a paper trail can resolve potential conflicts. Similarly, Chappell has improved upon forms widely used in the department and established a “key locker” instead of a monster key ring with 75-80 keys hanging off it.

Chappell participated in the commencement committee by creating seating assignments for students and helped the student affairs office re-design the program used at the graduation ceremony. In about 2004, Chappell participated in the budget committee as a staff member. His input was limited because the committee’s decisions are strictly advisory – it is not part of the governance of the College. Chappell is invited to FAPA faculty meetings because so many issues in the division turn on the facilities, such as ventilation problems in the theater.

While Chappell interacts with outside vendors for electrical work, air conditioning, a hydraulic lift, piano tuning, sound system, dance studio mirrors, publicity material, etc., he is merely obtaining quotes. Chappell is not involved in the process of getting funds approved for the expenditure. Another example of dealing with the public is that the theater is rented out to the Martha Graham Dance Ensemble. Chappell is not privy to the lease agreement and has no authority to negotiate rates with the lessee. His role is limited to logistical preparation and execution, like taking deliveries, making sure security has a list of people allowed in building and dealing with any technical problems.

Shana Richter, the administrative assistant, performs clerical functions. The previous secretary trained Richter on the job prior to her departure. As the senior employee in the office, Chappell familiarized Richter with the database program that contains mailing lists and faculty contact information. Richter has asked Chappell random questions, like whether a purchase order is sufficient for submission to the finance office. Chappell and Richter work together in order to meet deadlines. For the main stage productions, either Chappell or Richter oversees the student workers who are manning the box office or ushering.

With respect to faculty hiring, Richter creates files for candidates, inputting their names in database and sends response cards. Richter has a filing cabinet for a variety of documents, such as, contract rights to a performance.

- Humanities -

The director of the Writing Center is Lewis Frumkes. The parties stipulated to his supervisory status, however, no stipulation was reached regarding the only other employee in this department, administrative assistant Rahul Sharma, whom the Employer would exclude as a temporary employee. The administrative assistant title is included in the unit and neither party presented evidence which suggests that she should be excluded from the unit.

In the humanities/communication department, part-time clerk Ryan Cunningham was included in the unit, but part-time secretary Eleanor Bazzini is in dispute. The Employer contends that Bazzini is either a supervisor or a confidential employee.

Eleanor Bazzini is the administrative assistant to department chair, David Linton. Her general duties include typing, filing, answering the phone, copying, and scheduling appointments for guests and visitors. She also performs administrative duties for the search committee in humanities.²² In that regard, Bazzini sends letters confirming receipt of resumes, schedules interviews and informs the candidate of rejection. She also creates a grid using the committee's hiring criteria and inputs the candidates' information. The grid includes headings, such as, the terminal degree of the candidate, teaching experience, knowledge of primary interest, research accomplishments, references and experience showing proclivity to serving students and the institution. The search committee reviews the grid to eliminate candidates who fail to meet the basic criteria. Linton may ask Bazzini to copy and distribute the search committee's final report containing recommendations on hire.²³

Bazzini types and copies the humanities department annual report, which is prepared by Linton and submitted to associate dean Marguerita Grecco, academic dean Dawn Weber, the other division chairs, the president, and every member of the department. The annual report reviews the work of the departments within humanities, provides a table showing the growth or decrease in the number of course selections offered, a table tracing the number of students in each major within humanities, a list of goals and commentary, and a summary of proposed improvements. Another section includes an assessment and recommendation of candidates on a tenure track. Similarly, as a member of the committee on promotion and tenure, Linton composed a letter supporting or objecting to faculty applications for promotion and tenure. Bazzini may have typed that letter and in any event, copies are retained in Linton's office.

Notably, Bazzini does not have access to any documents regarding terminations. Nor does she have access to any documents concerning faculty council resolutions and deliberations, particularly those regarding the staff unionizing effort. Bazzini was not privy to any documents generated by the committee of concerned faculty which was a group opposed to president Shaver's proposal on an early retirement plan for faculty. Recently, Dawn Weber gave all of the department chairs a copy of the Union's proposals regarding the adjunct faculty and asked them to review and comment. The academic policy committee (comprised in part of the chairs) refused to comment and objected to the Employer's attempt to involve faculty in the negotiations with the adjuncts.

²² Ryan Cunningham assists the search committee with the clerical work if the open faculty position is within the communication arts department.

²³ Weber and Grecco contact the candidate and engage in a negotiation on the terms of employment. The offer letter containing these terms is sent to the candidate and is retained in Linton's office.

This written refusal is the evidence that the Employer relies on to support its claim that Richter and Bazzini “assist a manager with labor relations authority.”

Three work-study student aides perform clerical duties in the office on a part-time basis. With respect to supervisory duties, Bazzini’s role is similar to the tasks performed by Fults, Horsley and Chappell. Eligibility for work as a student aide requires that the applicant receive financial aid as a work-study student. The hiring process consists of Bazzini verifying work-study status, obtaining availability based on class schedule and engaging in some discussion of the student’s major. Upon hire, Bazzini completes the paperwork and forms necessary for the financial aid office. While Linton maintained that the students spend most of their time studying, the record demonstrates that Bazzini directs their work by prioritizing copying jobs. While it appears that Bazzini may recommend a reduction of hours or termination based on a student’s poor work performance, Linton could not recall any such terminations or adverse actions. Accordingly, the record is insufficient to establish that Bazzini has the authority to make an effective recommendation. Bazzini’s annual performance appraisal includes a category titled “supervisory responsibilities.” Linton clarified that Bazzini fulfils more of a mentoring role for the students. Regarding budgetary authority, Bazzini enters expenses in a log and keeps a list of all interns and independent study students.

- Sciences -

In the sciences department, the parties stipulated that the administrative secretaries were included in the unit. At the Ruth Smadbeck Communication and Learning Center, clinic director Linda Carozza is in dispute as a supervisor/manager. Zinovia Abatzis, college-wide chemical hygiene and science lab supervisor, is also in dispute as a supervisor/manager.

Zinovia Abatzis reports to department chair Ann Jablon. Abatzis has a bachelor’s degree in biology and various state issued certificates required for chemical laboratories that handle hazardous materials. As an example, she holds a certificate of fitness for supervision of chemical laboratories, a certificate of waste management employee training program, and a certificate of employee training program. Abatzis splits her time between her duties as chemical hygiene officer and the science laboratory supervisor.

As chemical hygiene officer, Abatzis maintains a database of the material safety data sheets in accordance with OSHA regulations. She makes certain that chemicals are properly handled and safely stored. In that regard, several departments handle chemicals, including facilities, food services, information technology, art, theater, and science; each department has a designated point person. Abatzis, however, performs college-wide functions because she is the only employee with certain certificates. As an example, Abatzis signs manifests to indicate that waste generated by the college is packed correctly and according

to DOT and EPA standards. Abatzis coordinates the disposal of chemical waste with an approved chemical waste removal company. Abatzis updated the College's chemical hygiene plan, however, a consultant was hired to create the other safety plans, including the Employer's hazardous waste plan.

As the lab supervisor, Abatzis ensures the lab's compliance with OSHA and local fire and hazardous waste regulations. Abatzis also assists faculty while the students conduct experiments during class time and checks that students are wearing the proper protective wear. She also works with faculty to design experiments. Abatzis prepares and cleans the laboratory. She maintains all laboratory equipment and handles any problems that arise, such as malfunctions with fume hoods or microscope repairs. Abatzis writes an annual report on the chemistry, biology, and physics laboratories, including the safety procedures, equipment, training, and future goals for the laboratories.

Abatzis trains and assigns work to a student lab assistant (currently Ashley Brower) who works ten hours per week.²⁴ Abatzis creates the assistant's schedule based on her class schedule. Abatzis directs Brower to perform tasks such as, pulling chemicals out of storage, cleaning glassware, returning clean glassware to its place, reviewing inventory and organizing slides. In addition, Brower assists in the preparation of lab experiments. On at least one occasion, Abatzis allowed the assistant to study during her work hours. Abatzis does not discipline the lab assistant. When work is not completed by the assistant, Abatzis simply completes the task herself.

Linda Carozza has a doctorate in speech and learning and is a licensed speech-language pathologist. She is a grade level 12 and reports directly to division chair Ann Jablon. Carozza's duties include developing a business plan, managing the budget and supervising the students' clinical training. She recently updated the Center's policy and procedure manual and prepared a report on the Center's activities, which is included in the divisional report submitted to Weber.

Carozza hires and directs the work of the student employees who are paid from funding pursuant to a private grant. These student employees perform clerical work, including maintaining databases of clients, handling client files and scheduling clients. Carozza also interviewed two of the current part-time workers and recommended their hire to Jablon.

B. Office of Institutional Advancement Overall Structure

The office of institutional advancement has two main functions: it produces all of the Employer's publications and communications; and, it engages in alumni relations and fundraising activity. Prior to the hearing, in July 2006, the division

²⁴ In the past, the lab assistant was a work-study student. While Brower does not receive this form of financial aid, she is paid at a comparable rate, is not evaluated, does not receive raises and has flexible hours to accommodate her academic schedule.

used an outside consultant for a seven-month fundraising project. At the expiration of that contract in February 2007, the division moved the fundraising campaign in-house resulting in a reorganization of the staff. Accordingly, the record is muddled by the fluctuation of the parties' positions and stipulations. Nonetheless, the evidence indicates that Margaret Minson is the vice-president for external relations and enrollment management and directly reporting to her are: the director of development, Nancy Kingston²⁵; the director of communications and publications, Alana Klein, the campaign director, Jean Wilhelm, the manager of alumni relations, Laura Davis, and the major gift officer, Maura Murphy.²⁶

- *Development*

As director of development, Nancy Kingston is responsible for the annual fund and plan giving. She also writes grant proposals and reports on the budget. The following employees report to Kingston: manager of the annual appeal, Suzanne Mulvihill; manager of corporations and foundations, (vacant); database specialist, Matt Estay; and grant writer, Tim Lynch. The Employer claims that Mulvihill and the currently vacant position of manager of corporations/foundations are managers and/or supervisors, in addition to Kingston.

Suzanne Mulvihill, the manager of the annual appeal plans, coordinates and implements the annual fund program which generates gifts from alumni, parents, students, faculty, staff, and friends. She is in charge of direct mail, phonathons, a senior class gift campaign, and a parents' fund. She sets the goals for these campaigns and targets names of those to be solicited and the timing of the solicitation. As an example, Mulvihill creates a phonathon plan, including the message or theme, the types of donors to target, the invitations, etc. The phonathon plan must be approved by Kingston. In the event mailings are necessary, Mulvihill obtains bids from various vendors and recommends one to Kingston or Minson. Mulvihill also oversees a part-time phonathon coordinator, who may be a student aide, but no evidence was adduced regarding the nature of the tasks assigned. Mulvihill recruits and oversees volunteers who gather data and make the phone calls; she coordinates dinner and determines gifts for the volunteers.

The manager of corporations and foundations (currently vacant) maintains relationships with and solicits corporate and foundation donations. The manager develops donation programs and reports back to the donors on their contribution. In that regard, the manager is expected to meet with corporate donors. The manager also monitors expenses written against the grants and submits

²⁵ The parties stipulated that director of development is a supervisor. In that regard, the record demonstrates that that the director selects and interviews candidates, effectively recommends hire and effectively recommends discharge. The director assigns work and writes the employee annual reviews.

²⁶ Clerk, Rory Kelleher and, administrative assistant, Zilpha Starnes were stipulated as included in the unit and no evidence was adduced regarding their position on an organizational chart.

documentation to Minson, who authorizes expenditures. Notably, grant writer, Tim Lynch, also monitors expenses on grants. Finally, the manager sets the standards and procedures the faculty must follow in order to receive a grant, however, these protocols require approval from Kingston and Minson.

- *Publications*

The following employees report to director Alana Klein: assistant manager of external affairs, Abigail Talcott; and communications assistant, Morgan Shada. The Employer claims that Klein is a manager and/or supervisor. Although the parties stipulated that Talcott and Shada are employees, the Employer argues that they should vote as professionals.

Alana Klein, the director of publications and communications, manages, edits, and produces all communications related to the college's capital campaign. Klein also produces the president's report, two alumni magazines, the alumni newsletter, fundraising invitations, fundraising brochures, the fundraising annual report, and the information that appears on the College's website. In that regard, Klein, along with the webmaster in the office of information technology, ensure the accuracy of the website postings. Klein consults with the admissions office on recruitment materials. While she works within pre-established graphic guidelines applicable to all marketing material and clothing, she has developed the specifications for font, colors and usage. She also selects and contracts with various vendors, such as, printers. Finally, Minson adopted Klein's recommendations that the college eliminate the newsletter, increase online communications, and increase the magazines produced.

Regarding supervisory duties, Klein wrote the job description for the communications assistant position, recommended a salary grade and interviewed applicants. Whether Klein effectively recommended Morgan Shada's hire is unclear from the record, as no evidence was adduced regarding the number of candidates considered or the selection process used by Minson. For disciplinary authority, the record indicates that on one occasion, Klein explained proper business conduct and requested that Shada conform; however, no evidence was adduced which would elevate this chat to a verbal warning. Similarly, the evidence regarding direction of work was vague. On secondary indicia, while Klein conducts annual evaluations of assistants Morgan Shada and Abigail Talcott, no evidence was proffered to establish that the evaluations would lead to a pay increase or that Klein is accountable for their work performance. Finally, two student aides report to Klein and she assigns them tasks, such as, checking the accuracy of donor information or website facts.

Morgan Shada, the communications assistant, writes articles for the college's e-newsletter, the alumni magazine, and pre-approved, internal communications to faculty. She edits, researches and fact checks for articles. Shada also deals with vendors relating to design and printing of certain materials.

As an example, Shada will work with print and design vendors to create and mail invitations for the annual Bedford Hills fundraiser.

Abigail Talcott, the assistant manager of external affairs, is the communications liaison between the Employer's lobbyists and governmental agencies regarding public grants. She is also the liaison with the Employer's public relations representative. Regarding budget, Minson asks Talcott to run an accounting and make recommendations on how to move money between three budget lines (the office of institutional advancement budget, the alumni relations budget, and the campaign budget). Minson, however, determines whether or not to transfer the money and fund an initiative.

- Campaigns

Jean Wilhelm, the campaign director, works with development associate, Cathy Smith and campaign associate, Catherine Moutoussis. The Employer claims that Wilhelm is a manager and/or supervisor and that Moutoussis is a professional employee. The record indicates that Wilhelm prioritizes Moutoussis' research on potential donors. In that regard, Moutoussis works two days per week analyzing the philanthropic capacity of donors. She works with database specialist, Matt Estay, to retrieve information regarding a donor's ability to give a substantial gift to the college. Moutoussis interprets the data and uses her personal contacts to strategize on how to effectively contact donors for gifts. Cathy Smith is a clerical employee who performs administrative tasks. As examples, she orders car service and makes lunch reservations for both Minson and Wilhelm.

- Alumni Relations

Laura Davis, the manager of alumni relations, develops, markets, plans and oversees all alumni events (including the volunteers) and the alumni website. The Employer claims that she is a manager and/or supervisor. With respect to events, Davis determines the location, invitees, admission price, and vendors. She recruits and manages the volunteers who work at the reunions, the president's medal and the annual golf tournament. Davis also meets with the alumni leadership counsel and makes recommendations on the best alumni to invite to fundraising events. For the website, Davis updates the information.

Regarding supervisory duties, Davis annually evaluates Caroline Binder and the development associate which could lead to a pay increase. Davis trained Binder on fielding alumni calls and directs Binder's daily work, however, the record was vague in this regard. Davis directs the work of student aides which includes checking alumni telephone numbers and zip codes, printing and mailing invitations, stuffing envelopes, etc. Davis is not involved with the selection or hiring of the student aides. The students submit the days and hours

that they are available to work and their schedule is based on the number of available desks and computers.

- *Gifts*

Maura Murphy, the major gifts officer, selects donors and solicits individual gifts, as opposed to corporate donations. The Employer claims that Murphy is a manager and/or supervisor. No employees report to Murphy. Murphy devises plans tailored to the interests of the donor, such as, naming opportunities or scholarships. She also gears plans to accommodate the donor's preferences regarding the type of financial arrangement, such as stocks, deferred transfers or cash. Minson reviews and approves the plan prior to implementation.

C. Student Affairs and Enrollment Management

- *Office of Student Affairs*

Michael Cappeto, vice-president for enrollment and student affairs, oversees the admission and retention of students, and the non-academic aspects of student life. The Employer contends that Cappeto's assistant, a position previously held by Jennifer Chappell, should be excluded from the petitioned-for unit as a confidential employee, a supervisor and/or a manager. This position is a grade level 9.

Management's labor relations strategy and its bargaining proposals are discussed at the executive council meetings which are attended by the office of the president and the five divisional vice-presidents: Weber, Minson, Cappeto, Ciraulo and Baker. Also present are Judith Adams, executive assistant to President Shaver and Marilyn Mills, administrative assistant to Senior Vice-President Maureen Grant. As stated earlier, both Adams and Mills are stipulated confidential employees. Chappell testified she has not attended or been briefed on the meetings, nor has she seen any management documents relating to the current unionization drive.

While the record is replete with testimony regarding maintenance of the "Board book" which contains the minutes of all of the Board of Trustees subcommittee meetings, agendas and supporting documentation, including issues surrounding the adjunct faculty bargaining and the instant organizing drive, the evidence indicates that Chappell is no longer charged with maintaining the book which is now kept in the human resources office.

The record demonstrates that Chappell prepares the agenda, attends, takes minutes, and distributes the final minutes of the student affairs weekly staff meetings which are attended by Cappeto, Ron Jackson, Misty Beasley, Michael Salmon, Jim Rogers and Chappell. Topics at staff meetings have included student retention, housing issues and the restructuring of the academic advising and

career development department. Notably, at a more recent staff meeting, Cappeto asked Chappell to leave the meeting because he wanted to discuss the Union's organizing drive.²⁷ Cappeto claimed that he may, at some future point, discuss management proposals and negotiations with his staff at their weekly meetings; however, this evidence is purely hypothetical. Finally, Chappell reviews many of the documents Cappeto sends to human resources to ensure that the form has been filled out properly. She also delivers documents to the payroll department. For example, Chappell reviews and delivers time sheets, new employee forms and performance evaluations.

Regarding supervisory status, Cappeto claimed that Chappell was involved in the hiring of Brian Quigley, director of counseling and psychological services (stipulated supervisor), Jeffrey Pate, the former health and wellness coordinator, and Demetria Jennings, administrative assistant for student affairs.

With respect to Quigley, Chappell was one of five staff members who conducted group interviews after which they each completed a form indicating their opinion of the candidates and their recommendations for hire. For Pate, Chappell chaired the search committee. As such, Chappell received resumes from human resources and recommended candidates for interviews. Jackson also reviewed the resumes and agreed with Chappell's assessment. Chappell conducted phone interviews of two potential candidates and recommended one of them for an in-person interview. Pate attended a group interview, wherein two of the interviewers were Chappell and Rosemary Ampuera, director of student activities. They recommended Pate as the better candidate; Jackson ultimately decided to hire Pate after he interviewed Pate alone. Finally, for the administrative assistant position, Chappell reviewed resumes held in a file in human resources and recommended Demetria Jennings for an interview. Both Chappell and Jackson interviewed Jennings and agreed that she should be offered the position.

After Jennings was hired, Chappell trained her for the administrative assistant duties, such as, ordering supplies online, completing payroll sheets and filling out student work-study forms. Chappell also trains student workers on Colleague, the computer program used throughout the Employer's operations.

Regarding managerial duties, Chappell has access to, but no authority over the budget; she merely completes purchase order requests which require Cappeto's approval. As an example, Chappell obtained a quote from Aramark for catering a staff meeting and submitted a purchase order form to Cappeto for his approval. In another instance, Chappell completed a purchase order for a presidential podium at the graduation ceremony that Ron Jackson had approved. Cappeto "tabled" the purchase order until he was sure there were sufficient funds in the budget. Chappell created an office manual regarding administrative tasks, such as, how to answer the phone and a directive that the first person to arrive at

²⁷ Cappeto testified, "I wouldn't think it appropriate, in this game of chess, to tell my opponent how I'm going to move my rook on the next move."

work should open the windows. Finally, Chappell was the chair of the Graduation Committee.²⁸ As such, she schedules meetings, sets the agenda (with Jackson's approval), books Lincoln Center as the venue, books a venue for the baccalaureate program, orders the caps and gowns, schedules the keynote speaker and makes the arrangements for related graduation events using volunteers upon Jackson's approval. Jackson and Cappeto must approve any expenses, venues, contracts and vendors.

A variety of offices comprise the student affairs and enrollment management division. The following deans and director of these offices report directly to Cappeto and they are: Ronald Jackson, dean of students office; Michael Salmon, dean of the office of academic advisement and career development; James Rogers, dean of the admissions office; and Misty Beasley, director of the office of resident's life.

- Dean of Students Office

Ronald Jackson, dean of students, runs the student activity programs and oversees the support programs, such as, counseling and psychological services, the campus chaplain and the academic access program. Reporting to him are Brian Quigley, director of counseling and psychological services, and Ann Jablon, director of the academic access program. Quigley and Jabon are stipulated supervisors.²⁹

The titles psychiatric consultant, counselor, coordinator of health and wellness (Dahlia Henry) and director of student activities (Rose Ampuero) are stipulated professionals, however, the Employer contends that Henry and Ampuero should be excluded as managerial and/or supervisory. In addition, the Employer contends that the following positions are supervisory: administrative assistant (Demetria Jennings), graduate intern (Molly Workman), and assistant director of academic access (Jacquelyn Bonomo). Finally, the Employer objects to the inclusion of campus minister (Virginia Dorgan) because of her affiliation with the Order of the Religious of the Sacred Heart of Mary.

Dahlia Henry, coordinator of health and wellness, reports directly to Jackson. The position requires knowledge of NYS department of health regulations and federal privacy laws concerning patient care. Henry has two masters' degrees in science and a doctorate in health education. She provides one-on-one counseling to students on health issues, such as, sexually transmitted diseases, nutrition, exercise and stress management. She also educates students regarding

²⁸ Chappell also served as a member and minute taker of the enrollment management committee and the staff retreat committee, and chair of the campus safety and security committee. She appears to have similar duties on these committees which are merely advisory.

²⁹ As stated earlier, in the academic affairs division, Ann Jablon is also the chair of the sciences department.

these topics during orientation and as part of the first-year mentoring program. Henry reports student immunizations to State agencies and tracks that every student has health insurance coverage which is mandated by the Employer. She implements policies and protocols regarding health risks, like the avian flu, and manages any health related emergency. The Employer does not have a campus clinic and therefore, she provides students with referrals to local health care providers.

Rose Ampuero, director of student activities, coordinates all extracurricular clubs and organizations. She oversees the new student orientation program, the campus activities board and the leadership scholars program. She also updates the student activities portion of the website upon Jackson's approval. Ampuero works closely with the media advisor, who is also a faculty member. After consultation with Jackson, Ampuero terminated the media advisor for poor work performance, which had no effect on his faculty status. No further testimony was adduced regarding the decisional process for the media advisor's termination or the hiring process for his replacement, if any. Further, the record is vague and conclusory regarding Ampuero's authority on hiring the graduate intern, Molly Workman. Jackson stated that Ampuero operated a table at a job fair at NYU and interviewed interested candidates, however, no testimony was adduced regarding who determined the discretionary criteria for hiring. The circumstances regarding the selection of the graduate intern was left unexplained. While Workman is paid \$8,000 per academic year to oversee the intramural sports program, no further evidence was adduced regarding her duties, work hours or the nature of her responsibilities.

Ampuero assembled the club and organization handbook, which includes a form to apply to become a club or organization recognized by the College. For the new student orientation program, Ampuero makes sure that new students receive identification and meal cards. She also helps new students complete financial aid paperwork. As the advisor to the campus activities board, Ampuero proposes funding levels to the budget committee and she can recommend to Jackson and Capetto transfers of funds between budget lines, if necessary. For the leadership scholars program, Ampuero tweaked the requirements for receiving a scholarship and conducts workshops which recipients are required to attend.

The duties of administrative assistant, Demetria Jennings, include ordering supplies, filing, coordinating student workers, scheduling the calendar for the Nugent Lounge, and answering phones. Jennings typically selects four student workers per semester. Again, the student workers' schedules are flexible and based around their classes. To request student assistance, a staff member completes a student task form and submits it to Jennings, who distributes the tasks to the students. While Jennings is alleged to have the authority to discipline and discharge student workers, no evidence was presented regarding instances where such authority was exercised. No evidence was adduced regarding discretion exercised in hiring or direction of work. The record was too general as it did not

explore the specific tasks performed by the students. Jennings is not held responsible for the work performance of the students.

As discussed earlier in the Scope section, the academic access program provides approximately thirty learning disabled students with study skills to help them realize their full academic potential. The director, Ann Jablon, supervises Jacquelyn Bonomo, the assistant director, and three other learning specialists who work part-time. The program is housed in two offices within the Ruth Smadbeck Communication and Learning Center. Entry into the program is linked with the general admission process.

Bonomo is a grade level 9 and spends most of her time working with program students, just like the other learning specialists. Specifically, they provide sixty-six hours of academic assistance per week to the program students. In addition to developing learning tools and accommodations, they also advise the program students on course selection. They proctor exams and at the end of each semester identify students who are academically at risk. Bonomo also conducts workshops on reading and test taking skills which are open to the entire student body.

As the assistant director, Bonomo reviews applications of students who wish to enter the program and makes recommendations to Jablon. Otherwise, her duties are clerical and administrative. At the beginning of the semester, Bonomo matches program students with a learning specialist, however, the assignment is primarily based on the specialist's availability and the student's convenience. Bonomo informs faculty members of various accommodations required for the program students. In that regard, paperwork is required to inform professors of the student's participation in the program, separate testing accommodations and the necessity of mid-semester progress reports. Bonomo reminds the other learning specialists that this paperwork must be completed and timely submitted. Bonomo is a conduit between the other learning specialists and Jablon regarding the progress of the program students. Similarly, the learning specialists notify Bonomo regarding absences; however, Jablon requires that they make up the time. Bonomo writes the annual report for the academic access program which is submitted to Jackson, but only after she consults with Jablon regarding content.

With respect to hiring, after review of the applications, Bonomo informed Jablon that a particular candidate would not be a good fit; Jablon, nonetheless, decided to interview that person. While Bonomo participated during the interviews, Jablon led the questioning. In the end, notwithstanding Bonomo's reservations about a candidate, Jablon hired that learning specialist. Bonomo cannot discipline the learning specialists. Regarding discharge, over a period of about three years, Bonomo repeatedly reported performance issues of former, part-time learning specialist, Jean Lithgow, and recommended termination. Finally, after complaints from a faculty member, Jablon disciplined and eventually discharged Lithgow.

Virginia Dorgan is the campus minister. The Employer argues that: 1. the Board cannot exert jurisdiction due to her religious status; 2. Dorgan lacks a community of interest with the other classifications in the petitioned-for unit; and 3. Dorgan's membership in the religious Order that founded the college creates a conflict of interest and therefore, she should be excluded from the unit.

Dorgan supports the spiritual and religious lives of the students and staff by scheduling events that are non-secular, though not affiliated with any one religion. For instance, she organizes memorial services and community outreach programs. She provides information and resources on religious, spiritual, and social justice issues. Dorgan participates in college-wide events, student affairs committees, and monthly staff meetings for the student affairs employees and the larger division. Her office is a cubicle in the student affairs suite. Although she works part-time, Dorgan is salaried and receives medical benefits.³⁰

Dorgan's Order, the Religious of the Sacred Heart of Mary, founded the college in 1948. Recently, ownership was transferred to the Board of Trustees which is charged with establishing the Employer's policies, overseeing the finances and ensuring that the president carries out the programs. Currently, three members of the Order sit on the Board; however, the record does not indicate whether the Employer is required to appoint members of the Order to the Board. In that regard, the by-laws of the governing documents provide that the minimum number of members is nine. Accordingly, the evidence adduced does not establish that the Order controls the policymaking on the Board.

- Office of Academic Advisement and Career Development

Michael Salmon, dean of the office of academic advisement and career development oversees counseling regarding course selection, internship programs and employment opportunities. The parties stipulated that the administrative secretary, Melissa Weekes, is included in the petitioned-for unit. The Employer objects to the inclusion of the other seven employees in this department: director of career development and internships (Diana Nash), counselor (Susan Ach), associate director of academic advisement (Heather Wotton), academic advisor (Shrandra Edmeade), associate director of first year experience (Lisa Moalem), director of new student advisement (Nakimuli Torkornoo), and academic advisor (Stacie Benick). The Employer claims that all of these positions are supervisory and/or managerial.

Diana Nash, the director of career development and internships, reports directly to the vice-president of student affairs, Michael Cappeto. She is a grade 10. Nash oversees the career services center which encompasses student

³⁰ Generally, part-time employees are paid on an hourly basis and are not eligible for medical benefits.

development workshops, career counseling, employer outreach, internships, and student employment.³¹

Nash conducts seminars on writing resumes, cover letters and job hunting techniques. Nash developed “the explorer program” which assists students who are undecided on a major. She also standardized a program for advising and providing resources to students on academic probation. By building relationships with various businesses, Nash developed and implemented new internship programs which seek to provide students with greater employment opportunities. Nash developed a policy limiting internship opportunities to those students who had a minimum GPA of 2.8 after obtaining thirty credit hours at the college or fifteen credit hours for full-time transfer students. She also decides whether an internship meets the educational objectives of the college in order for the student to receive credit hours for the work.

Susan Ach is a part-time counselor, who advises students in the pre-professional programs, such as, pre-law. While the Employer maintains that Nash is her supervisor, no evidence was adduced regarding direction of work. Further, Salmon completed Ach’s appraisal and no evidence supports that Nash is evaluated on Ach’s performance. The record suggests that Nash oversees two student interns who are obtaining credit toward their graduate degrees; however, the record is largely undeveloped regarding the relationship between Nash and the interns. Finally, the Employer cites to the fact that Nash “informs” the staff in the Center for student services to identify students for referral to career development. No further testimony was adduced regarding the frequency or nature of Nash’s interaction with these employees.

Notably, in 2005, only 59% of the freshmen returned for their second year. In response, the Employer revised the job descriptions of the following employees in order to create specialists, all of whom report to Salmon.

Heather Wotton, associate director of academic advisement, coordinates all advisement activities for students, including a mandatory first-year mentoring course. She is responsible for the content of this course. Wotton advertises for instructors, selects faculty and adjuncts to instruct the course, reviews student assessments of the professors, and determines which faculty to invite to teach for the following year. Wotton has not terminated any professor from teaching the mentoring course and no evidence was presented that professors were not re-hired to teach the course. Wotton herself also teaches the class. Wotton is a member of the Bedford Hills committee which oversees the academic program for students working at the prison program. Like Lisa Moalem, she is a member of the academic programs subcommittee of the steering committee for the periodic review process.

³¹ The career services center is located across from the financial services that together comprise the Center for Student Services.

Part-time advisor Shandra Edemeade advises students on course selection, major selection and degree requirements. It appears that Wooton and Edemeade share the workload. Wotton assisted in the hiring of Edemeade by reviewing resumes, interviewing candidates, introducing candidates to the office staff, and narrowing the candidate pool to three candidates. No further evidence was adduced regarding the decisional process on hiring.

Lisa Moalem, associate director of the first year experience, provides leadership and coordination of first year experience, including orientation, academic advisement, personal mentoring, and first year social activities. She meets with all first year students to aid them in selecting courses and counsels or refers students on academic, social, or psychological issues that may arise in their first year. Moalem attends weekly meetings with Misty Beasley, director of resident life, and Brian Quigley, director of counseling and psychological services, to discuss transitional issues first year students experience.

Recently, Moalem and Salmon presented to Cappeto, Beasley and Jackson various initiatives to increase retention of first year students. After consultation and revisions, they presented the initiatives to the Executive Council and ultimately, to the Board of Trustees. Upon approval, Moalem implemented programs to achieve the initiatives, such as, creating a first-year student committee, a newsletter for parents, a data bank of students, and developing the "Get Connected" program which introduces students to a staff member.

Further, Moalem assisted in a periodic evaluation of goals set by the accrediting body. A steering committee oversees the periodic review process, which occurs every five years, and includes a periodic review report and an institutional self-assessment report. The steering committee created eleven subcommittees; Moalem was appointed as a liaison for the student life and services subcommittee which is comprised of approximately eight members.³² The subcommittee's co-chairs, Jackson and faculty member Alister Sanderson, direct the work of the subcommittee members. Moalem testified that she had no control over the content of the submitted report. In addition to the subcommittee meetings, all liaisons also attend steering committee meetings. The final recommendations of the subcommittees are reviewed by the steering committee which submits a report to the Board of Trustees. Moalem assisted the steering committee in editing portions of the periodic review report for typographical errors. She was also asked by David Mold, liaison to the faculty subcommittee, to draft a portion of the report which pertained to the workload of the Employer's staff.

Finally, the Employer asserts that Moalem will be responsible to assign work to a part-time advisor, a position which is currently vacant. This evidence is purely speculative. While Moalem has reviewed resumes and interviewed

³² The members include faculty, director of counseling and psychological services, Brian Quigley, and students serving as student government association members.

candidates, the evidence does not indicate that she has effectively recommended hire or that she will have any discretion regarding assignment of work.

Nakimuli Torkornoo, director of transfer student advisement, advises transfer students and international students on academic issues. She also evaluates all requests to transfer college credits by reviewing the transcripts from the prior institution. She runs the orientation program for transfer students. Further, the record highlights a project whereby Torkornoo conducted research comparing the Employer's transfer admissions policies with the policies of other institutions. That report was eventually presented to academic dean, Dawn Weber.

Stacy Benick, a part-time academic advisor, also meets with transfer students to offer academic advisement. Torkornoo determines the priority of the transfer credit evaluations and directs Benick to complete some of this work. Notably, despite Torkonoo's objection, Benick was assigned to participate in the "Get Connected" initiative. Salmon described the relationship between Torkornoo and Benick as mentoring and the record regarding who actually supervises Benick is largely based on hearsay and hypothetical evidence.

- Admissions Office

James Rogers, dean of admissions office, together with assistant director, Lisa Velez, and associate director, Jenna Schebell, oversee the admission process and all three are stipulated supervisors. The senior counselor and counselors, the adult recruiter, the coordinator of transfer recruitment, and the two data entry clerks are stipulated as included in the unit. The positions in dispute are: the coordinator of admissions support operations (Margie Tavares) and the director of international students and multicultural programs (Krystof Zaba). The Employer claims that they are supervisors and/or managers.

The Employer recently created a new title called the coordinator of admissions, currently held by Margie Tavares, which is a grade level 7 position. The admissions office is located on the first floor of Nugent, where the counselors meet with the public; however, the data entry clerks are located in an office in Main. On the recommendation of a consultant, the Employer uses the coordinator of admissions to physically oversee and prioritize the workload of the clerks and the student aides working in Main.

Previously, Tavares was the prospect manager which entailed mailings to prospective students. She worked with IT so that on-line applications are downloaded directly into the system. Registration, advisement and academic departments frequently ask Tavares to run reports from the database. In her new position, Tavares also prioritizes the work of the data entry clerks. The data entry clerks are entry level positions and they primarily input application information so that admissions counselors can evaluate the file. Tavares keeps an eye on work

flow so that admissions can timely decide applications. She does not have input into the data entry clerks' performance evaluations. While she may relay vacation or sick leave requests, assistant director Lisa Velez approves it. When Tavares first got the job, dean Rogers informed her that she would co-supervise with Velez in that Tavares would be physically located in Main to oversee any issues that arose. In that regard, Tavares monitors lateness and reports incidents to Velez, who steps in as the supervisor of the entire area. Rogers visits the area daily; Velez visits once or twice per week.

Three student aides also work in Main. Very little testimony was adduced regarding the hiring process other than that Tavares completed paperwork for Rogers' signature. Rogers testified that "we" interview the students without further describing the process or whether Tavares effectively makes recommendations. The only prerequisite for hire appears to be proficiency in typing. The students' hours are created to accommodate their class schedule.

The Employer claims that Krystof Zaba, director of international recruitment, is a manager.³³ Zaba evaluates files of prospective international students and determines eligibility for admission. He recruits students from local consulates in NYC and has expanded the program to include advertising that targets specific markets. As an example, he attended college fairs for three weeks in Southeast Asia and is exploring recruiting students from Turkey. He is the designated school official to ensure compliance with immigration requirements for foreign students regarding submission of the correct forms in order to obtain visas. He is responsible for tracking students regarding medical issues and grades. He conducts an orientation program during which he inputs the students' information into the database.

Ten \$5,000 scholarships are available for which Zaba determines the recipients. The program is new and he has never distributed to full \$50,000 allotment. Last year, three scholarships were awarded.

Zaba submitted to Rogers the content for an international student brochure. In that regard, Zaba did not set the tuition and fees – he merely copied and inserted the numbers. In fact, much of the brochure was lifted from other publications. Rogers rejected the suggested photographs but approved all of the proposed text. Zaba can edit the material on the web without Rogers' prior approval. He also developed college-wide cultural sensitivity programs and international education week.

³³ In its brief, the Employer also argues that Zaba is a supervisor because he adjusts grievances of the international students and because he directs a host of personnel – faculty and staff – regarding necessary accommodations for international students.

- Office of Resident's Life

The director of the resident's life office, Misty Beasley, supervises the resident directors who enforce the Employer's rules and policies governing student housing. Beasley's administrative assistant, Joy Kenner, was stipulated as included in the unit. The resident directors (Julie Brown, Andrew Burrows, Maran Kajfez and Christine Mosier) are in dispute. The Employer claims that they are supervisors.

The Employer houses roughly 750 students at three "dorms" known as the de Hirsch residence ("de Hirsch"), the 55th Street hall ("55th") and the Vanderbilt hotel ("the V"). De Hirsch and the V each have an assigned resident director and 55th has two assigned resident directors due to its size.

Senior resident advisors and resident advisors are students who report to and assist the resident directors ("RDs"). The senior resident advisors perform office work for a combined total of eleven hours per week. They also prepare duty and program calendars. The RDs track their office hours and arrange alternate hours if necessary. Further, the RDs oversee fourteen resident advisors who are dispersed throughout the facilities. The resident advisor is usually the first person that a student would contact with a complaint. They live with the other students and are responsible for their assigned floor. On a daily basis, they resolve problems such as roommate issues or facility malfunctions. Typically, they schedule a social or educational activity for the residents to attend on a monthly basis. They also attend weekly staff meetings and biweekly one-on-one meetings with their RD. Further, the resident advisors at 55th also have desk duty and night duty. While on desk duty, the resident advisors handle complaints and maintain property, including games and vacuums, which can be checked out by students. Night duty entails being on call from 8:30 pm to 8:30 am, once a week. They earn a room scholarship (\$10,000 value) and a stipend ranging from \$700 to \$1,000 per semester.

The RDs receive wages (grade level 6) and a rent-free apartment, which is a benefit valued between \$2,000 and \$3,000 per month. The RDs oversee resident advisors and are on-call 24 hours per day. They also have administrative duties which are performed in the office for an average of 20-25 hours per week. They work closely with security and the building staff. The RDs may contact a vendor for fixing broken washing machines or other minor building repairs.

The RDs recommend hire, fire and rehire of the resident advisors. The record demonstrates that hiring resident advisors results from an extensive selection process which is set up and run entirely by the RDs. After reviewing the applications, which include a resume, three essay questions and references, the RDs schedule a one day group interview to narrow the candidates. This initial winnowing is followed by second tier interviews which are conducted as a roundtable with at least one RD and approximately three resident advisors who

discuss a specific topic, like leadership or programming. The candidates spend about 15-20 minutes in each room. The RDs make a final decision based on the interviews and on the rare occasion of a tie, Beasley intervenes. The RDs notify the resident advisors whether they are hired or rejected.

With respect to terminations, Beasley relayed the following example. About three years ago, a resident advisor missed night duty and was late for other activities. The RD issued a verbal warning, a written warning and then a probationary letter stating that if his performance did not improve, he would be fired and not considered for rehire. The resident advisor was eventually fired for breach of confidentiality which is a basis for immediate termination. Notably, the RD handled the entire situation and merely relayed to Beasley the actions that she had taken and copied Beasley on the letters sent to the resident advisor. The RD did not seek Beasley's approval prior to taking disciplinary action.

Regarding evaluations, the RDs evaluations are considered if the resident advisor requests rehire. Poor performance is communicated by the RDs throughout the year and the advisors have an opportunity to improve. Also, the one-on-one meetings provide an opportunity for the RD to tell the resident advisor to correct negative performance. Finally, the RD determines which projects or programs to assign to which resident advisor primarily based on the advisors' preferences.

D. Office of Administration and Finance

Paul Ciraulo, vice president of administration and finance, is also the chief financial officer of the college. The administrative coordinator/assistant and the part-time administrative assistant were stipulated as confidential employees who are excluded from the unit.

Six departments comprise the office of administration and finance. The directors and a vice-president report directly to Ciraulo and they are: Christina Flanagan, human resources; Dom Lavin, security and physical plant; Wayne Santucci, controller's office, Patricia Hanson, information technology; and Maria De Innocentiis, the Center for Student Services.³⁴

- Human Resources

Director Christina Flanagan and assistant director Ayana Murray are stipulated supervisors. The benefits manager, Kevin Ng was stipulated out of the unit as a confidential employee.

³⁴ It appears that some of the employees in this office report to De Innocentiis and some of the employees report to Michael Salmon.

- Security

None of the campus security guards are sought by the instant petition.

- Physical Plant

Director of physical plant, Dom Lavin, oversees the maintenance mechanics in the building and grounds department and the custodians in the campus cleaning department. The Employer objects to their inclusion on community of interest grounds, as discussed in section I, Scope; however, it does not argue exclusion based on supervisory/managerial/confidential status.

- Controller's Office

Wayne Santucci is the associate vice-president for administration and finance, and the controller. The parties stipulated that he is a supervisor, along with the assistant controller, Manal Meseha. The director of budgets and the office assistant were stipulated as confidential employees.

The accounts payable clerk was stipulated in the unit. Further, the coordinator of special events, the financial analyst and the staff accountant were included in the unit as professionals. The only employee in dispute is Christian Rubio, payroll coordinator, whom the Employer argues is a confidential employee.

Christian Rubio, reports to assistant controller, Manal Meseha. No evidence was presented that Meseha is involved in labor relations or negotiations with any union.

Rubio's duties include coordinating with the Employer's payroll service to ensure that the files are sent and received. Rubio also follows up on whether the payroll service timely made tax payments. She prepares W-4 forms. With respect to reimbursement for relocation expenses, Rubio highlights any expenses that must be reported on a W-2 form. She is also informed of a termination and is responsible for calculating any payments due to the employee, such as, accrued vacation time or severance.

Wayne Santucci testified that he informs new hires that the comptroller's office is "a confidential shop." Any breach of that confidentiality is stealing and therefore, grounds for immediate discharge. Rubio has access to confidential information, specifically, the Employer's payroll.

- Information Technology

Patricia Hanson, director of information technology, and the assistant director for client services are stipulated supervisors.

The following titles were stipulated as included in the unit: IT technicians, junior IT technicians, the network telecom support technician and one of the switchboard operators. The Employer claims that Ebony Lugo, the other part-time switchboard operator, is a supervisor.

For professionals, the following titles were stipulated as included: director of systems applications, senior system program developer, system manager and system administrator. The Employer, however, argues that John Walter, director of systems applications, and Noray Joseph, telecom supervisor, should be excluded as managers and/or supervisors.

John Walter, director of systems applications, is responsible for the Employer's website, web servers and developing new applications. Walter has a bachelor's of science degree, twenty years experience in the technology field and has worked for the Employer for about four years. Walter directs other departmental employees on projects, such as getting different applications to interface.

Brenna Steiner, the web assistant, reports to Walter. Walter reviews the web changes that are submitted to him and he directs Steiner to complete those tasks that he deems her capable of handling. If he thinks she can't do the work, Walter may give it to Luciano Mazzella, assistant administrator. Walter signed Steiner's evaluation. She is a psychology student at the Employer who was hired in January 2006. Hansen claimed that Walter has the authority to assign Steiner overtime, even though, the Employer's policy prevents students from working more than 19.5 hours per week. The only example on the record was an instance where Steiner was permitted to work thirty-five hours to cover Walter's one-week vacation. Accordingly, the record indicates that any alleged authority regarding overtime assignment is limited to one isolated event.

With respect to managerial responsibilities, Walter drafted the policy for lending out laptops to keep track of inventory and prevent theft. Upon review, Hansen altered Walter's proposed policy because she found it too restrictive. Similarly, Walter drafted the website update procedures, which Hansen and Ciraulo significantly changed prior to approval and implementation in order to make it less onerous.

Noray Joseph, the telecom supervisor, maintains the college's telephone switch and oversees the switchboard area. The prior telecom supervisor, Chris McCrane, recommended the hire of Nikita Clark, the prior switchboard operator, which Hanson approved after she also met and interviewed Clark.³⁵ While Hanson claimed that McCrane had the authority to evaluate and discipline Clark, she could not recall any disciplinary incidents and no evidence supports that McCrane was evaluated on Clark's performance. Regarding direction of work, McCrane would

³⁵ The Employer maintains that all of the testimony relating to Chris McCrane is also true for Noray Joesph and that the testimony concerning Nikita Clark is applicable to Ebony Lugo.

alert Clark to upcoming school closings or possible fire drills. In the event Clark was unavailable to work, McCrane covered the shift. The record does not disclose that McCrane, and now the newly hired Joseph, exercised any independent discretion in the exercise of their duty as switchboard operator.

The testimony regarding Ebony Lugo, the switchboard operator, is thin. Hanson, with no further elaboration, declared that the switchboard operator is responsible for selecting about twenty part-time switchboard operators (who seem to be students) and work-study students. The only testimony adduced regarding direction of work is that Clark instructed about six students working at the help desk on how to fill out a “ticket” which entails logging onto an application called “track it” and filling in the caller’s name, extension and the nature of the problem. The switchboard operator appears to be among the lowest paid employees at the college, grade level 4.

- Center for Student Services

The parties stipulated that following six titles are supervisory and excluded from the unit: director of financial aid (Christina Bennett), associate director of financial aid, director of student accounts (Fanny Perez), director of student financial services (Maria De Innocentiis), the registrar and the associate registrar.

The following titles are included in the unit: account representatives, service representatives, financial aid counselors and the office assistant. The following titles are included as professional employees: assistant registrar, financial aid counselor, and the financial aid technical assistant. The only employee in issue is Joel Leguerre, assistant director for student accounts. The Employer claims that he is a supervisor and/or a professional.

On an organizational chart, the director of student financial services, Maria De Innocentiis, reports directly to Ciraulo. She has four direct reports: the director of financial aid, the director of student accounts, the director of registration and records, and the financial aid technical assistant. Under the director of student accounts, the roles of the associate director and the assistant director and the employees who report to them are unclear, in part, because the testimonial evidence offered by the Employer varies from the organizational chart that it submitted in evidence. Further, the testimony concerns the work performed by Fanny Perez, as the assistant director. At that time, however, the associate director position was vacant. Currently, Leguerre holds the assistant slot and Perez has been promoted to the associate director position.³⁶

In any event, reporting to assistant director Leguerre is the collections counselor (vacant) and the student account representative, which is a newly

³⁶ The Employer maintains that the testimony relating to Fanny Perez when she was the assistant director, is also true for Leguerre.

created position. On the organizational chart, the counselor and the representative also report directly to associate director, Perez. The chart further indicates that five student service representatives report directly to De Innocentiis. She testified, however, that they also report to Leguerre to the extent that their jobs pertain to student accounts.

With respect to the collections counselor, De Innocentiis claimed that she and Perez both participated in the hiring interviews, but that Perez was “the decider,” even though they both agreed on the chosen candidate. Regarding discipline, Perez issued a verbal warning to the collections counselor for poor job performance. Specifically, Perez informed the counselor that the controller’s office had notified De Innocentiis regarding paperwork was not properly completed on a batch of refund checks. With respect to direction of work, the record indicates that the assistant director reviews delinquent accounts and makes sure that the information is correct prior to determining that collection is appropriate, however, the director, associate director and the assistant director together determine whether an account moves into collections based on guidelines established by the college. No testimony was adduced regarding supervisory authority exerted by Perez or Leguerre vis-à-vis the student accounts representative or the student service representatives.

E. Institutional Research and Planning

Peter Baker, vice president of research and planning, is a stipulated supervisor. The only employee position in this department is currently vacant. The testimony adduced regarding the job duties of the researcher is that this employee would assist Baker, who provides statistical analysis of information contained in the Employer’s databases. ³⁷

III. ARGUMENT

A. Scope of the Unit

The threshold issue to be addressed is the scope of the appropriate unit. As noted above, the Petitioner seeks a unit of all employees – professional and non-professional – employed by the Employer at its only campus, who are not already represented in another unit.

It is well-established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage*, 91 NLRB 409 (1950), enf’d. 190 F.2d 576 (7th Cir. 1951). The Board’s task, therefore, is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the only appropriate unit or the ultimate unit. In making unit determinations, the Board first looks to the unit sought by the petitioner. If it is appropriate, the inquiry ends and the Board does not evaluate any competing unit contentions. If, however, the

³⁷ This research position is included in the unit.

unit is inappropriate, the Board will scrutinize the employer's proposal. *Dezcon, Inc.*, 295 NLRB 109 (1989). In assessing the appropriateness of any proposed unit, the Board considers community of interest factors such as employee skills and functions, degree of functional integration, interchangeability and contact among employees, and whether the employees have common supervision, work sites, and other terms and conditions of employment.

In determining the appropriateness of a unit in a college or university environment, the Board applies the rules traditionally used to determine the appropriateness of a unit, as set forth above. *Livingstone College*, 290 NLRB 304 (1988); *Harvard College*, 269 NLRB 821 (1984); *Cornell University*, 183 NLRB 329, 336 (1970). In this regard, a campus or college-wide unit, like a plant-wide unit, is viewed by the Board as presumptively appropriate under the Act. *Livingston College, supra*; *Western Electric Co.*, 98 NLRB 1018 (1952). See also § 9(b) of the Act. The burden of proving that the interests of a given classification of employees are so disparate from those of others that they cannot be represented in the same unit rests with the party challenging the unit's appropriateness. *Greenhorne & O'Mara, Inc.*, 326 NLRB 514 (1998). In the instant case, the Employer has not met its burden of showing that the petitioned-for unit is inappropriate.

With respect to skills and functions, the record demonstrates that the employees sought by the instant petition are doing largely administrative work, irrespective of their titles. The record does not indicate that the duties of the business office clericals are significantly different from the administrative employees in the academic departments. Accordingly, the cases cited by the Employer are inapposite. See, *Mitchellace, Inc.*, 314 NLRB 536 (1994); *Cook Composites*, 313 NLRB 1105 (1994). More generally, in that line of cases, the Board weighed whether the business office clericals share a community of interest with a discrete group of petitioned-for production employees. Here, in contrast, the unit sought includes all of the employees, so that the exclusion of one group of clericals would create a residual unit which the Board seeks to avoid. *Airco, Inc.*, 273 NLRB 348 (1984). Further, even if the undersigned were to apply principles of the above-cited cases to the instant petition, on these facts inclusion is appropriate. In examining the community of interest between these groups, the record demonstrates that the business office clericals are not physically separated from the clericals in the academic departments, as the administrative offices are interspersed throughout the adjoined buildings. Again, no evidence was adduced of any substantive difference in the work that they are performing. To the contrary, the record demonstrates similar working conditions including the common use of a software program, called "colleague," which is used throughout the Employer's facility.

The Employer's argument with respect to separating the professionals into two groups rests on the premise that the Board has treated the business operations differently from the educational operations because they have divergent

goals, citing *Yeshiva University*, 444 U.S. 672 (1980). In *Yeshiva*, the Court grappled with the issue of whether faculty members are managers. The Court distinguished faculty as professionals in other contexts. Compare *University of Vermont*, 223 NLRB 423 (1976)(excluding department chairmen as supervisors), with *Northeastern University*, 218 NLRB 247 (1975)(department chairmen included within bargaining unit because they act primarily as instruments of the faculty). *Id.* at n10. None of these considerations are applicable here. In the instant case, Petitioner seeks a unit of essentially rank-and-file staff.

Further, the Employer's reliance on Board law misconstrues the underlying rationale of those cases. For decades, the Board has struggled to adopt an industrial model to an educational setting, mindful of the unique relationship between the faculty and the institution. Here, because the petitioned-for unit excludes faculty and adjunct faculty, this line of cases is inapposite. *Syracuse University*, 204 NLRB 641 (1973)(law professors excluded from faculty unit); *Adelphi University*, 195 NLRB 639 (1972)(parties stipulated to a mixed unit of faculty, librarians and research assistants).³⁸

The Employer argues that the professional employees have a greater community of interest with the faculty and therefore, the unit sought here is inappropriate. I am not persuaded by this argument as Petitioner seeks a wall-to-wall unit of all unrepresented employees. The record demonstrates that the Employer runs an integrated operation in which all of the unrepresented employees are devoted to the education of the students. The learning specialists share a community of interest with the audiologists in the Learning Center in that they are helping people overcome disabilities. The learning specialists confront some of the same issues that full-time HEOP counselor Kevin Smith (who is stipulated as included in the professional unit) deals with in counseling and mentoring students. The learning specialists counsel program students on course selection, not unlike the counselors found to be employees included in the unit, as more fully discussed in the manager/supervisor/professional sections set forth below. Learning issues often have a behavioral component and the learning specialists are apt to meet with psychiatric consultant Jennifer Blum, who was also stipulated as included in the professional unit. With respect to clinic director Linda Carozza, the record indicates that while the audiologists mentor students, the teaching function is exclusively reserved to Carozza. Having found she is a supervisor, as set forth in the supervisory section below, Carozza is excluded from the petitioned-for unit on eligibility grounds. Finally, the record does not demonstrate that the librarians engage in functions closely related to teaching, except as guest lecturers for an isolated class.

In conclusion, while the Employer suggests its operations constitute two separate towers, the record indicates that the administrative and academic offices

³⁸ The Employer submits that Petitioner's agreement to stipulations regarding certain classifications that will accrete into the adjunct faculty unit is an admission that the professionals should be divided into two groups. I find that the stipulations are not sufficient evidence to support this argument.

are interspersed throughout the adjoined buildings thereby facilitating the frequent intermingling of staff. Regarding functional integration, the Employer correctly notes that the manner in which the Employer organizes its operations is a consideration for the Board. Here, the record demonstrates a high level of functional integration among the five divisions. Rather than separate hierarchical structures, the record demonstrates the collegial nature of the college through the staff's participation in a plethora of interdisciplinary committees. The policies and procedures applicable to all the staff emanate from the centralized human resources department. In that regard, the Employer's contention that part-time employees should be excluded from the unit because they do not share a community of interest with the full-time employees, is specious. While the Board has recognized a distinction between full-time faculty and adjunct professors, those cases do not apply here. Further, the record indicates that the supervision, duties and work environment of the part-time and full-time employees are the same. Of particular importance in this case, as the Employer concedes, in the absence of an endowment, the academic mission of the college cannot be fulfilled without the financial operations that support it. Accordingly, the record demonstrates that the campus-wide, petitioned-for employees share a sufficient community of interest to constitute an appropriate unit.

The Bedford Hills program is an outreach project embedded in the Employer's special programs department under the academic affairs division. While the Bedford Hills program has special rules due to its unique environment, the Employer's personnel policies apply to these employees. The record fails to establish that there is not a commonality of skills and functions between the Bedford Hills secretary and the clericals on the upper East-side campus. Accordingly, to the extent that this position has not been eliminated and still exists, it is appropriately included in the unit. Notably, the record does not disclose, nor does the Employer argue, that this position should be excluded on eligibility grounds. With respect to the tutors, the record does not disclose whether the Bedford Hills tutors are performing the same work as the professional or master tutors in the Center for academic advancement who were stipulated to be part of the faculty unit. The record, however, does support a finding of inclusion based on community of interest factors. Absent a stipulation regarding accretion to the adjunct unit, I find that the Bedford Hills tutors are eligible to vote, as these employees would otherwise be unrepresented.

In *Cornell University*, 183 NLRB 329 (1970), the Board decided, among other things, the issue of whether a statewide unit was appropriate, instead of a smaller group comprised of the employees at the NYC Industrial and Labor Relations School (ILR). The Board held that where an employer operates a number of facilities, it would consider such factors as prior bargaining history, centralization of management, employee interchange, employee skills and functions and the geographical location of the facilities in relation to each other. *Id.* at 336. None of those factors are relevant to the instant case because the Bedford Hills program is not another facility operated by the Employer. It is a

maximum security prison operated by the State. The record clearly establishes that the Employer operates one campus in one location. In contrast, *Research Foundation*, 337 NLRB 965 (2002), discussed whether a university-wide, multi-campus unit of all outreach programs was appropriate or whether the unit should be limited to the Bronx campus. Here, the Employer does not operate eleven campuses with multiple outreach programs and therefore, this case cited by the Employer is also inapposite.

Finally, while the Employer urges the Board to extend the health care rules requiring a special petition to combine professionals and non-professionals, nothing in this record justifies that such an enormous shift in Board law is warranted. The Hospital rules flowed from Congress' concern that the undue proliferation of bargaining units in acute care hospitals would create a burden that would interfere with the operation of hospitals. There is no such concern in higher education.

Regarding Dorgan, the Employer's reliance on *St. Francis College v. NLRB*, 562 F.2d 246 (3d Cir. 1978), is misplaced because in the instant case, the founding Order does not control the policymaking and administration of the College through its minority block on the Board of Trustees. Further, the Board's holding in *Mercy Hospital of Buffalo*, 730 F.2d 75 (1984), does not require a finding that Dorgan should be excluded from the instant unit based on her religious affiliation. Unlike the nun in *Mercy Hospital*, Dorgan fills out time sheets like the other workers, receives her pay on the same day as the other employees, and uses a college identification card to enter the facility along with the other employees. Her office is situated among the other student affairs workers and she is invited to annual college-wide events. She reports to the same supervisor, Dean Ronald Jackson. The record evidence establishes that Dorgan's events and services are ecumenical in nature and do not propagate any particular religion. Further, the evidence establishes that Dorgan's work – offering students counseling services – is functionally equivalent to the other employees in the dean of students' office who offer students counseling services on nutrition, stress, drug abuse, etc. and therefore, she shares a community of interest with the other employees in the petitioned-for unit. Accordingly, the fact that Dorgan is salaried and receives health benefits is insufficient to overcome the community of interest that she shares with the other student affairs employees included in the unit.

B. Eligibility Issues

- Managerial Employees

The Board defines managerial employees:

as those who “formulate and effectuate management policies by expressing and making operative the decision of their employer.” These employees are “much higher in the managerial structure” than those explicitly mentioned by

Congress, which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.” Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interest by taking or recommending discretionary actions that effectively control or implement employer policy.

NLRB v. Yeshiva University, 444 U.S. 672, 682-683 (1980) (citations omitted). The Board has recognized that employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. *Id.* The party asserting managerial status bears the burden of proof. *Allstate Insurance Co.*, 332 NLRB 759, 759 n.2 (2000).

In the instant case, the record is insufficient to determine that any of the alleged managers are so aligned with management as to be excluded from the petitioned-for unit.

In the academic affairs division, the record demonstrates that the president and the senior vice-president, along with vice-president for academic affairs and the dean of the college, Dawn Weber, and the associate deans in the academic affairs office, implement the Employer’s strategic plan for academic affairs, in conjunction with department chairs. From under these layers of management, the Employer suggests that FAPA facilities operations director, Ross Chappell, establishes policy. While Chappell has announced certain prohibitions in order to contain costs, i.e., no eating or drinking in the theater space, his authority is limited to commonsense rules concerning maintenance issues and logistics. He has no authority with respect to the departmental budget nor has he participated on any committees that affect the direction of the theater program. Accordingly, Mary Fleisher’s un rebutted testimony regarding the limited authority and discretion of the operations director demonstrates that he does not formulate, determine or effectuate Employer policies and therefore, Chappell is not a manager. *Holly Sugar Corp.*, 193 NLRB 1024 (1971)(an employee does not acquire managerial status by making some decisions or exercising some judgment within established limits set by higher management).

Grade level 9 employee, Zinovia Abatzis, who wears two hats - chemical hygiene officer and lab supervisor - does not possess the requisite level of discretion to find managerial status. The evidence indicates that Zinovia, in conjunction with key faculty from a variety of departments, revised the Employer’s chemical hygiene plan as required by OSHA regulations, in

conjunction with key faculty from a variety of departments. Moreover, the record does not demonstrate that the chemical hygiene protocols were substantively changed. The Employer further argues that Abatzis' recommendations in her annual report prove managerial status. While her annual report notes that the laboratory's hours were expanded, the evidence fails to establish that this accommodation to the students was initiated by Abatzis. Further, in the annual report, statements such as, "a continued updating and maintenance of our inventories has enabled us to employ our resources in an extremely purposeful manner" does not indicate that Abatzis sets policy for the sciences department. In conclusion, the record is vague and suggests that the chemical hygiene plan was merely updated and the lab supervisor's duties are carried out only after close consultation with the faculty and sciences chair Ann Jablon. *Lewis & Clark College*, 300 NLRB 155, 163 (1990)(testimony lacking details on recommendations is insufficient if higher administrators independently reviewed and evaluated recommendations).

Finally, in academic affairs, the record evidence regarding the director of summer and winter programs and study abroad, Elaine Vukov, fails to establish that her duties are so aligned with management to exclude her from coverage in the unit. Vukov works with faculty to develop courses for the summer and winter session; however, the record is vague regarding Vukov's role in developing new summer and winter course offerings, and whether the summer or winter course offerings have changed since Vukov's hiring. With respect to the study abroad pamphlets, Weber approves the content of divisional promotional materials prior to publication, and the record does not establish that Vukov exercised any discretion in this regard. Further, Weber oversees and coordinates the relationships between the division and external organizations, such as, accrediting organizations, consortial programs and articulation agreements; and nothing in the record suggests that this authority had been delegated to Vukov. In fact, Vukov's role in developing the "host side" of the study abroad program reveals that she merely researched the topic. The determination as to whether to implement the new program rests solely with Weber. Accordingly, the Employer has failed to carry its burden of proof that Vukov makes policy decisions necessary to find managerial status. *University of Great Falls*, 325 NLRB 83 (1997)(testimony too vague to permit a meaningful assessment of the employees' actions and evidence insufficient to find that recommendations were generally followed).

The record regarding the office of institutional advancement is unclear and confused, marked by shifting positions and personnel. To the extent the organizational structure can be discerned, the record demonstrates that Vice-president Margaret Minson sets the policies regarding publications and fundraising activity. She collaborates with Nancy Kingston in the fundraising area and implements the Employer's strategic plan through the creation of the annual fund plan. The evidence does not support a finding that any of the other employees in this division rise to a managerial level. Notably, the Employer's

decision to bring the fundraising activity in-house, which sparked the recent reorganization of the entire division, was a matter outside the scope of any of the following positions.

Alana Klein, director of publications and communications, works within well-defined parameters regarding marketing materials and the record does not support that she was consulted in establishing the guidelines. Suzanne Mulvihill, manager of appeal plans, oversees discrete aspects of the annual plan, like the senior class gift campaign, under the supervision of Kingston. The record concerning the vacant position of manager of corporations and foundations, indicates that this position is also directly monitored by Kingston. Laura Davis, manager of alumni relations, handles the logistics of events, like class reunions and the president's annual golf tournament. Her recommendations regarding invitees are not a sufficient basis to find managerial status. Maura Murphy, major gifts officer, has some discretion regarding the type of plan offered to potential donors; however, the record indicates that all gift plans are subject to review and approval by Minson prior to implementation. No evidence was adduced regarding the purview of the campaign director, Jean Wilhelm, managerial or otherwise. In large part, these employees create and attend social functions to secure gifts. The evidence does not support that they are so firmly aligned with management so as to preclude them from the protections of the Act. *Progress Industries*, 285 NLRB 694 (1987).

In the office of student affairs, Jennifer Chappell performs administrative duties, such as, filling out purchase orders and obtaining quotes from vendors, which she submits to Vice-president Cappeto for his approval. She has no authority regarding the department's budget. She created an office guide dealing with uniformity in clerical tasks and no testimony was adduced regarding the consequences of deviation from her directives regarding the proper way to answer the phone. Her participation on various advisory committees merely indicates the collegial nature of the work environment – not managerial status. *St. Thomas University*, 298 NLRB 280 (1990)(recommendations of committees not enough; must show committee is the moving force behind formulation and adoption of university policies).

In the dean of students office which oversees all of the student activities programs, Dahlia Henry, coordinator of health and wellness, implements policies regarding health risks, such as the avian flu. The record does not disclose whether these policies are simply adopted from the federal health and human services CDC recommendations or the extent to which the policies are defined by State and local mandates. Accordingly, the record is inconclusive regarding her managerial status. Therefore, the Employer has failed to carry its burden of proof. Rose Ampuero, director of student activities, works in consultation with Dean Jackson and faculty members to facilitate student organizations. The record does not establish that she determines the Employer's policies regarding extracurricular clubs. Finally, Jacquelyn Bonomo performs largely administrative

functions as the assistant director of the academic access program. She interfaces with faculty regarding accommodations for program students and handles much of the program paperwork. While the record indicates that she makes recommendations regarding acceptance into the program, she does not establish the criteria for admission. All managerial decisions appear to be within the domain of Director Ann Jablon and Vice-president Cappeto. *University of Great Falls, supra.*

In the office of academic advisement and career development, Dean Michael Salmon oversees the staff. Notably, no record evidence supports a finding that the part-time employees were involved in the management decision to reorganize the department to create more specialized areas. Moreover, no additional record evidence supports that part-time counselor, Susan Ach, and part-time academic advisors Shrandra Edmeade and Stacie Benick are managers.

With respect to the other employees, all of whom are a grade level 10, the Employer has failed to establish that these employees can take discretionary actions that control the Employer's policies. Cappeto attributed to Diana Nash, associate director of academic advisement, sole responsibility for standardizing a program concerning probationary students and expanding the minimum requirements for participation in the internship program. However, because Cappeto was hired in April 2006, he could not testify regarding the evolution of these policies and Nash's role, if any, in developing them. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991)(conclusory statements made by witnesses in their testimony without supporting evidence is not sufficient to establish managerial status).

Director of career development and internships, Heather Wotton, teaches a mentoring course and hires faculty to teach sessions of this class. Her role in updating the course is not tantamount to initiating a mandatory course for freshman. Her participation on various advisory committees, alongside members of the student government association, is insufficient to find managerial authority. *St. Thomas University, supra.*

The evidence regarding associate director of first year experience, Lisa Moalem, indicates that she reported on the best practices of the first-year experience after attending an international conference of colleges. The subsequent initiatives attributed to her, however, were really the result of extensive review and modifications by the combined management of the entire division of student affairs and enrollment. Finally, Torkornoo's research comparing the Employer's transfer policy with other institutions is insufficient to find managerial status, especially absent evidence of adoption of any substantive recommendations. *Lewis & Clark College, supra.*

In the admissions office, no record evidence was adduced regarding the managerial status of grade level 7 employee Margie Tavares, and therefore, she is an employee and eligible to vote. While the duties of Krystof Zaba as the designated school official reporting to Homeland Security on the immigration status of visiting students are important, his position is not managerial. The record is vague regarding the alleged expansion of the international recruitment program. Like the study abroad program under Vukov, the record does not demonstrate that Zaba has done anything more than research possible alternatives to the existing program. With respect to the brochures, Zaba borrowed much of the information from existing catalogues and the record indicates that the publication was vetted by dean James Rogers and the office of institutional advancement prior to release. *University of Great Falls, supra*.

Finally, in the office of administration and finance, the Employer's claim that Noray Joseph, telecom supervisor, is a manager cannot be sustained because no evidence was presented that he has managerial authority. With respect to the director of systems applications, John Walter, the record indicates that his recommendations for rules regarding checking out laptops and updating the website were reviewed and modified prior to implementation by director of IT Patricia Hanson and Vice-president Paul Ciraulo. Accordingly, even if these rules were viewed as policy-level initiatives, the record demonstrates that his alleged discretion is constrained by the managers to whom he reports. *Lewis & Clark College, supra*.

- *Supervisory Employees*

Before analyzing the specific duties and authority of the employees in issue, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer

supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even in this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Indeed, such “minor supervisory duties” should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974)(quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4). In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047(2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without

detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (September 29, 2006) and two companion cases, *Croft Metals, Inc.*, 348 NLRB No. 38 (September 29, 2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (September 29, 2006). In these decisions, the Board refined its analysis in assessing supervisory status in light of the Supreme Court's decision in *Kentucky River, supra*. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's definition of Section 2(11) in the healthcare industry as being overly narrow by adopting "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood, supra*, slip op. at 3.

With regard to the Section 2(11) criterion "assign," the Board considered that this term shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id.* slip op. at 4. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." *Id.* The Board clarified that, "...choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id.*

The Board defined the parameters of the term "responsibly to direct" by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986). In this regard, the Board quoted the following language from in *NLRB v. KDFW-TV, Inc., supra* at 1278:

To be responsible is to be answering for the discharge of a duty or obligation...In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs...Thus in *NLRB v. Adam [& Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department." *Oakwood*, slip op. at 6 – 7.

In agreeing with the circuit courts that have considered the issue, the Board found that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*, at 7.

In *Kentucky River*, the Supreme Court rejected the Board’s interpretation of “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” *NLRB v. Kentucky River Community Care, Inc.*, *supra* at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted a definition of the term “independent judgment” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Oakwood*, *supra*, slip op. at 7. The Board noted that the term “independent judgment” must be interpreted in contrast with the statutory language, “not of a merely routine or clerical nature.” *Id.* slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* (citation omitted) However, “...the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.*

In applying the above-mentioned case law, and based on the record evidence, I conclude that the evidence is insufficient to establish that the employees at issue are supervisors as defined by Section 2(11) of the Act, with the exception of the resident directors (“RDs”) and the clinic director.

The record demonstrates that the RDs hire, discipline and fire the resident advisors and therefore, they are supervisors within the meaning of Section 2(11). The RDs are “the face” of the institution to parents and other organizations, especially in emergency situations. They exercise independent judgment in directing the resident advisors to perform a range of duties. The RDs run the hiring process which entails an elaborate application and a series of interviews, after which they reach a consensus on hiring about seventeen student advisors. Moreover, the record demonstrates that the RDs discipline and discharge

advisors for cause. Specific examples were discussed on the record and it is clear that the director of resident's life, Misty Beasley, has delegated to the RDs the authority to hire, discipline and discharge the resident advisors.

Similarly, Linda Carozza, clinic director, is a supervisor because she hires and directs the clerical employees who maintain the database for clients, handle client files and schedule appointments. Carozza also oversees the work of the part-time audiologists and supervises the clinical training of students majoring in communication disorders. These employees are performing diagnostic work and devising treatment plans for patients. Accordingly, the evidence indicates that Carozza exercises independent judgment in supervising the work assignments of the employees in the Center. Having found supervisory status, I need not reach the issue of managerial or professional status.

In every other instance, the Employer has failed to carry its burden with respect to the alleged supervisory status of the employees at issue in the instant case.

In the library, Director Donna Hurwitz supervises a small staff of professionals and oversees the student aides. Hurwitz determines the number of student aides that are hired based on the library's budget. The student aides self-select from a posted roster of available work-study jobs. No evaluation of skills is involved; rather, the slots are filled on a "first come - first served" basis. Weber's testimony regarding the hire of the current, regular part-time employees, reveals that it was Hurwitz who effectively recommended hiring the part-timers. No evidence supports that any employees in the library has been disciplined or terminated. While media center director, Jordan Horsley "counseled" a student regarding the importance of notification for any shifts that the student could not fill, this incident highlights the casual nature of the students' employment in that scheduled shifts are secondary to coursework. With respect to assignment, the students self-select whether they prefer the circulation desk or the media center. At the circulation desk, students choose from a task list whether to shelve books or input data in the computer system. Accordingly, the Employer has failed to carry its burden regarding the supervisory status of David Fults, circulation supervisor and Jordan Horsley, director of the media center because any assignments were minimal and routine in nature and do not require the exercise of independent judgment and, therefore, do not rise to Section 2(11) status. *Brown & Root, Inc.*, 314 NLRB 19 (1994).

As the Operations Director of FAPA facilities, Ross Chappell oversees the functioning of a multi-use theater space. While he processes the paperwork for the student aides who work in the division, the record shows that most of the student aides and other part-time staff report to one of the six stipulated supervisors in the division. Only two students work in the cramped quarters of the theater office performing routine clerical tasks, such as filing and photocopying. The Employer has not carried its burden to establish that

Chappell has hiring authority, especially in light of the collegial nature of Fleisher's management style. That Chappell is a well-regarded employee does not mean he is vested with the authority enumerated in Section 2(11) of the Act.

Shana Richter, who performs clerical work in the theater office, also assigns the student aides routine office work. Richter and Chappell oversee the student workers who man the box office or usher during theater department productions. The record does not demonstrate that these tasks require anything more than the obvious – distributing tickets and glancing at the number on the ticket and finding the corresponding seat. Accordingly, the record is insufficient to determine that Richter's authority requires the exercise of independent judgment, necessary for finding that the employee is excluded from coverage of the Act as a supervisor. *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635 (2001).

Eleanor Bazzini performs clerical work in the humanities department. Her role with respect to the three work-study student aides is limited to a pro forma hiring process, devising flexible schedules that accommodate academic work, and direction of routine tasks, such as photocopying. The record establishes that as department chair, David Linton supervises Bazzini and the student aides. The Board has held that only supervisory personnel vested with genuine management prerogatives should be considered supervisors, not straw bosses, leadmen, setup men and other minor supervisory employees. *Ten Broeck Commons*, 320 NLRB 806, 809 (1996).

Zinovia Abatzis, in her capacity as science laboratory supervisor, works alongside a student assistant and together, they primarily set up and clean the lab space after students conduct classroom experiments. The record does not demonstrate that Abatzis has the authority to hire, discipline or fire the lab assistant. While she lobbied Jablon to hire an assistant to help with the workload, the evidence does not indicate that hiring authority was delegated to her. As the chemical hygiene officer, her duty to police safety standards does not establish that she has disciplinary authority over any of the faculty or students in the lab.

In institutional advancement, as stated in the above managers section, Margaret Minson, vice-president of the division, runs a small office along with Director Nancy Kingston. The record demonstrates that Minson and Kingston have hiring, disciplinary and firing authority over the employees in this department. Minson evaluates employees based on her direct observation of their work performance. The two employees who report to Kingston (Mulvihill and the vacant manager of corporations position) are not themselves supervisors, as no employees report to them. While the record demonstrates that Mulvihill oversees volunteers for the phonathon, these workers merely solicit donations by calling phone numbers for a short-lived project. Further, the four employees who report directly to Minson are not supervisors. Alana Klein

assigns student aides routine clerical tasks. With respect to the assistants Morgan Shada and Abigail Talcott, the record demonstrates that Kingston effectively hired these employees. Instead, Klein appears to have a mentoring relationship with them as the senior staffer. The scant record evidence regarding Jean Wilhelm's authority shows that she prioritizes work for the associates in her area. Similarly, Laura Davis directs assistant Caroline Binder and the student aides to perform routine tasks, such as stuffing envelopes. Accordingly, while Klein, Wilhelm and Davis may prioritize work, the record does not demonstrate any discretion is involved in the assignments. Finally, the record indicates that Maura Murphy works alone.

Jennifer Chappell, administrative assistant in the student affairs office, has participated in the interview process for hires along with other staffers. The record does not indicate, however, that Dean of Students Ron Jackson relied on his secretary's recommendations in hiring Brian Quigley, the director of counseling and psychological services, a stipulated supervisor. With respect to the former health and wellness coordinator, Jeffrey Pate, whatever the consensus was from the group interview, the record is clear that Jackson independently interviewed Pate. The same is true for administrative assistant, Demetria Jennings. While Chappell may have had some involvement in sifting through resumes, the evidence is insufficient to conclude that she has the authority to effectively recommend hires. To the extent that the Employer claims that Chappell supervises Jennings, the record is clear that Jennings performs clerical tasks, such as answering the phone, in the dean of students' office, under the supervision of Dean Ronald Jackson. While Jennings may have looked to, and consulted, Chappell as someone with more institutional experience, the record does not indicate that Jackson has relinquished supervisory authority over his staff to Chappell or that Chappell possesses or exercises any supervisory authority over any employee. *First Western Building Services*, 309 NLRB 591, 601 (1992).

I find based on the facts that Rose Ampuero, director of student activities is not a statutory supervisor. While the Employer contends that Ampuero supervises faculty, the record demonstrates that she works in consultation with the faculty in coordinating extracurricular activities. With respect to the discharge of the media advisor, the record is vague regarding the relationship between Ampuero and the media advisor, such as the nature of her authority with respect to the advisor's duties and does not disclose whether the selection of the media advisor is within Ampuero's purview. To the extent the Employer relies on Ampuero's selection of the graduate intern, the record is similarly insufficient to establish supervisory authority. Accordingly, the Employer has failed to carry its burden with respect to Ampuero's supervisory duties.

I find that Demetria Jennings is a secretary whose duties do not include the exercise of any independent judgment or discretion with respect to the student workers. No evidence was adduced regarding any authority to discipline

or discharge student workers. Based on the very general testimony concerning Jennings' relationship with the student workers, the Employer has failed to meet its burden to establish that she is a statutory supervisor.

Jacquelyn Bonomo works alongside the other learning specialists and is merely a conduit for the part-timers with respect to Jablon. The record does not establish that Bonomo effectively recommends hiring or discipline. To the contrary, the examples set forth on the record indicate that Jablon was not responsive to Bonomo's recommendations; Jablon only acted upon complaints from faculty. Jablon issued discipline and decided to eventually discharge a learning specialist independent of any input or actions by Bonomo. The assignment of the other learning specialists to certain students is based primarily on availability, not an analysis of skills. *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 7 (1995)(reassignment authority was merely a means of assuring compatibility).

The Employer submits that virtually everyone in the office of academic advisement is a supervisor, except the secretary. Diana Nash works with part-time counselor, Susan Ach, on advising students in career choices. There is no evidence to support that Nash has any of the primary indicia of supervisory authority vis-à-vis Ach. Heather Wotton works with part-time advisor, Shandra Edemeade, regarding course selection. While the record indicates that Wotton participated in the interview process, the record does not establish that Dean Salmon has delegated hiring authority to her. Lisa Moalem will work with a part-timer (the position is currently vacant) on first-year experience and no testimony was adduced regarding her authority to assign work or any other indicia of supervisory status. Finally, Nakimuli Torkornoo works with part-time academic advisor Stacy Benick dealing with transfer students. They share the workload regarding evaluating transfer credits. The record does not support that Torkornoo has authority to assign her work. In sum, the record indicates that Dean Salmon supervises the employees in this department with some hands-on assistance from Vice-president Cappeto. The Board, in *First Western Building Services*, supra, held that instructions given by a more experienced employee to a less experienced employee is not "responsible direction of employees" within the meaning of § 2(11) because the use of independent judgment is not involved; rather, it is the authority of a skilled employee over an unskilled employee. *First Western Building Services*, supra.

In the admission office, as a result of an outside consultant's recommendations, the Employer amended the job description of Margie Tavares to include acting as a liaison to assistant director Lisa Velez. This was done because Tavares and two data entry clerks are physically located in a different area of the building from the main admissions office. The record indicates that Tavares works alongside the clerks and merely prioritizes their word processing tasks. The record demonstrates that Dean Rogers, Lisa Velez and Jenna Schebell, all stipulated supervisors, run the department. *Pepsi-Cola Bottling Co.*,

154 NLRB 490, 493-494 (1965)(relaying complaints to management or reporting inefficiency is not sufficient). The Employer's arguments regarding Krystof Zaba is not supported by case law. The fact that Zaba may interface with faculty and other personnel regarding the special needs of international students does not comport with the statutory definition of assignment and responsible direction of work.

In the information technology department, director John Walter prioritizes the work of the web assistant who works part-time. The evidence regarding assignment of overtime was limited to one incident in which the part-timer filled in for Walter while he was on vacation. This isolated incident is insufficient to establish that Walter has the authority to regularly assign overtime work. Walter also works with other departmental employees on specific projects of limited duration. Accordingly, the record overall indicates that he is the senior, most experienced employee who acts as a leadman, not a supervisor. The record regarding the supervisory status of newly hired telecom supervisor Noray Joseph was based on Hanson's conclusory testimony regarding employees who are no longer employed. To the extent Joseph supervises the switchboard operator Ebony Lugo (whom the Employer also claims to be a supervisor), the routine direction and assignment of the work does not require the use of independent judgment. Moreover, the record indicates that in the event Lugo is absent, Joseph covers the shift by performing the work himself. Similarly, the supervisory status of switchboard operator Ebony Lugo is based on evidence that she trained the part-time, student switchboard operators on the computer program used for tracking calls. Based on the record, any assignments by Joseph and Lugo are minimal and routine in nature and do not require the exercise of independent judgment and, therefore, do not rise to Section 2(11) status.

Finally, in evaluating the vague documentary and testimonial evidence regarding the student financial services group, I find that assistant director for student accounts, Joel Leguerre, is not a statutory supervisor. While it appears that Leguerre interfaces with other unit employees on the status of certain accounts, the record does not demonstrate that he exerts any indicia of supervisory authority over these workers. It appears from the evidence that the director of student accounts, Fanny Perez, and the director of student financial services, Maria De Innocentiis, supervise the service representatives. However, the record is inconclusive in this regard and therefore, the Employer has failed to meet its burden.

- *Confidential Employees*

The Board applies a narrow test in making determinations as to whether an employee is confidential and should, therefore, be excluded from a bargaining unit. Employees are excluded as confidential employees only if they act in a confidential capacity to persons who formulate, determine, and effectuate

management policies in the field of labor relations, or if, in the course of their duties, the employee regularly has access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 190 (1981); *Erica, Inc.*, 344 NLRB No. 96 (2005); *In re EC Waste, Inc.*, 339 NLRB 262 (2003); *Inland Steel Co.*, 308 NLRB 868, 872 (1992). The party asserting confidential status, bears the burden of proving that the position is a confidential one. *Erica, Inc.*, *supra* (citing *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987)).

The Employer argues that the following four positions are confidential, and therefore, should be excluded from the bargaining unit: Christina Rubio, the payroll coordinator, Jennifer Chappell, administrative assistant to the vice president for student affairs and enrollment management, Shana Richter, the administrative assistant to the division chair for FAPA, and Eleanor Bazzini, the administrative assistant to the division chair for humanities and communications.

There is insufficient record evidence to determine that any of the alleged confidential employees act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations or has regular access to the types of confidential documents which would require that they be excluded from the petitioned-for unit.

Rubio, the payroll coordinator, reports to assistant controller, Manal Meseha. There is no evidence in the record that Meseha formulates, determines, and effectuates labor relations policies. Therefore, Rubio does not assist in a confidential capacity to a person who formulates, determines, and effectuates labor relations policies.

The Employer further argues that Rubio is a confidential employee because she has access to confidential payroll and personnel documents. The record reveals that Rubio has access to payroll documents, which include employee salaries, advance notice of terminations, and amount of monies due upon termination. The Board has consistently held that access to confidential payroll information is insufficient to justify excluding an employee from the right to bargain collectively. *In re E.C. Waste, Inc.*, *supra*; *Bakersfield Californian*, 316 NLRB 1211 (1995); *Rhode Island Hospital*, 313 NLRB 343 (1993); *RCA Communications Corp.*, 154 NLRB 34 (1965); *Dinkler-St. Charles Hotel, Inc.*, 124 NLRB 1302 (1959). Moreover, review of Board law reveals that advance notice of terminations is not sufficient to prove confidential status, because the information is in the process of being forwarded to the affected employee. *Bakersfield Californian*, *supra*. Finally, evidence that Rubio has access to information that the Employer considers confidential is irrelevant to the analysis of Rubio's status, because as the Board has stated, payroll documents "have no material connection with negotiations for a collective-bargaining agreement." *In re E.C. Waste, Inc.*, *supra*. For the aforementioned reasons, the Employer has

failed to prove that Rubio is a confidential employee, and therefore, she is properly included in the unit.

Shana Richter is the administrative assistant to Mary Fleischer, department chair of FAPA. Richter performs typical clerical work, and also assists the search committee in the hiring process by making candidate files, creating a spreadsheet with candidates' names, and sending letters indicating that the Employer received the candidates' application. Richter also has access to a filing cabinet containing a variety of documents. The parties dispute whether or not Fleischer formulates, determines and effectuates labor relations policies. The record evidence suggests that the faculty division chairs have refused to participate in the collective-bargaining process, including evaluating management and union proposals. No other evidence supports a conclusion that Fleischer formulates, determines, or effectuates labor relations policies. Regardless of Fleischer's role in collective bargaining, an employee is not precluded from union representation merely because the employee's supervisor is involved with union negotiations. To be considered confidential, it is necessary that the employee also have access to or assist in the preparation of labor relations information. *See, e.g., Bakersfield Californian, supra; In re E.C. Waste, Inc., supra; Firestore Synthetic Latex Co., 201 NLRB 347 (1973).* There is no evidence in the record that Richter assists in the preparation of, or has access to, any labor relations documents. To the extent that the Employer argues that Richter assists Fleischer in a confidential manner in Fleischer's role in developing and implementing labor relations policy that argument is not supported by the record evidence.

Further, the Employer argues that Richter is a confidential employee because she has access to confidential documents through her clerical assistance to the hiring committee and because she has access to files which contain employee personnel documents. In support of its position that access to personnel documents renders an employee confidential, the Employer relies on *Americas Best Quality Coatings Corp., 313 NLRB 470 (1993)*. Notably, the Employer cites to the administrative law judge's decision, because the issue was not reviewed on appeal to the Board. In light of the fact that the Board has long-held that access to employee personnel type records is insufficient to confer confidential status, the Employer's reliance on *America's Best Quality Coatings Corp.*, is misplaced. Accordingly, Richter's access to current employee personnel type documents alone is insufficient to render Richter a confidential employee. *In re E.C. Waste, Inc., supra; Bakersfield Californian, supra; Rhode Island Hospital, supra; RCA Communications Corp., supra; Dinkler-St. Charles Hotel, Inc., supra.*

Richter's access to personnel type documents of prospective employees through her assistance to the search committee is insufficient to prove confidential status for the same reasons that access to current employee personnel files is insufficient to confer confidential status. The Employer cites no Board law to indicate otherwise. For the foregoing reasons, the Employer has

failed to carry its burden of proof with respect to Richter's confidential status and therefore, she is properly included in the unit.

Eleanor Bazzini is the administrative assistant to David Linton, department chair for humanities. She assists Linton by performing primarily clerical tasks. To the extent the Employer argues that Bazzini is a confidential employee because she assists Linton who is involved in labor relations policy, the Employer's argument must fail. The record evidence indicates that Linton does not formulate, determine, and effectuate labor relations policy; and, in fact, by his own admission, Linton refuses to do so with respect to the initial bargaining in the adjunct faculty unit. Therefore, Bazzini does not assist in a confidential capacity to a person who formulates, determines and effectuates labor relations policy.

The Employer further argues that Bazzini is a confidential employee based on her access to confidential documents. The record reveals that Bazzini has access to personnel documents relating to current and prospective employees. The Employer has provided no case law to support that access to these documents would render Bazzini a confidential employee. Contrary to this position, the Board has long-held that access to personnel documents of employees is insufficient to exclude an employee from the bargaining unit. *In re E.C. Waste, Inc.*, *supra*; *Bakersfield Californian*, *supra*; *Rhode Island Hospital*, *supra*; *RCA Communications Corp.*, *supra*; *Dinkler-St. Charles Hotel, Inc.*, *supra*. Again, for the same reason, Bazzini's access to prospective employees' personnel documents is not sufficient to confer confidential status.

The record indicates that Bazzini also has access to the division's annual report which includes an assessment and recommendation of candidates on the tenure track which are similar to employee evaluations. Both contain reviews of the employee's performance and may include recommendations for promotion or pay increase. The Board has held that access to, or even the typing of, employee evaluations is not sufficient to confer confidential status. *See, e.g.*, *Lincoln Park Nursing & Convalescent Home, Inc.*, 318 NLRB 1160 (1995); *Rhode Island Hospital*, *supra*. Access to the annual report is insufficient evidence. Accordingly, the Employer has failed to prove that Bazzini is a confidential employee, and Bazzini is properly included in the unit.

The administrative assistant to Cappeto, vice-president for student affairs and enrollment management, a position formerly held by Jennifer Chappell, is alleged to be a confidential employee. The record evidence establishes that Cappeto formulates, determines and effectuates labor relations policy, as a result of his participation in the executive counsel meetings. However, an employee is not precluded from union representation merely because the employee's supervisor is involved with union negotiations. To prove confidential status, the Employer must not only prove that the supervisor not only formulates, determines and establishes labor relations policy, but must also prove that the employee has access to or assists in the preparation of the labor relations information. *See*,

e.g., *Bakersfield Californian*, *supra*; *In re E.C. Waste, Inc.*, *supra*; *Firestore Synthetic Latex Co.*, *supra*. With respect to Cappeto's attendance at executive counsel meetings, the parties have stipulated that two other employees, Adams and Mills, are confidential employees because they attend and take the minutes of the executive counsel meetings, not Cappeto's assistant.

Instead, Cappeto's assistant attends his weekly staff meetings and records minutes. The issues discussed therein include employee discipline and the restructuring of the department which resulted in raises and the creation of new positions. Knowledge of employee discipline and employee promotions before the employees are aware is not sufficient to render Cappeto's assistant a confidential employee. *Bakersfield Californian*, *supra*. The record evidence suggests that at some future point Cappeto may discuss collective-bargaining proposals and negotiations at his weekly staff meetings. However, employees who may sometime in the future perform as a confidential employee, but are not doing so at the time of the determination, are not excluded as confidential employees. *Curt Gowdy Broadcasting, Inc.*, 222 NLRB 530 (1976); *American Radiator Corp.*, *supra*. Moreover, the evidence that at some point in the future, Cappeto's assistant may be exposed to labor relations policy during a weekly meeting is rebutted by the record evidence that Cappeto asked his assistant to leave during a confidential discussion of labor relations policy. Accordingly, this evidence is insufficient to confer confidential status.

The record further reveals that Cappeto's assistant reviews personnel documents for accuracy prior to their submission to the human resources department. Again, mere access to payroll and personnel documents is insufficient to confer confidential status. *In re E.C. Waste, Inc.*, *supra*; *Bakersfield Californian*, *supra*; *Rhode Island Hospital*, *supra*; *RCA Communications Corp.*, *supra*; *Dinkler-St. Charles Hotel, Inc.*, *supra*. Finally, the record shows that Cappeto's assistant stored, and had access to the "Board book." However, the record revealed that Cappeto removed the Board Book from his assistant's possession, and Cappeto's assistant no longer has access to the Board book.

For the foregoing reasons, and despite the fact that Cappeto has labor relations authority, there is no evidence sufficient to prove that Cappeto's assistant has access to or assists Cappeto in any way in matters of labor relations policy. In light of all of the above, the Employer has failed to prove that the administrative assistant to Cappeto is a confidential employee. Cappeto's assistant is properly included in the unit.

- Professional Employees

Section 9(b)(1) of the Act precludes the Board from finding appropriate a unit that includes professional employees with nonprofessional employees, unless a majority of the professional employees vote to be so included. The

definition of a professional employee is set forth in Section 2(12) of the Act as follows:

The term “professional employee” means – (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of a specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or (b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Section 2(12) is meant to apply to small and narrow classes of employees. *The Express-News Corp.*, 223 NLRB 627, 630 (1976). Accordingly, employees must satisfy each of the four requirements set forth in Section 2(12) before they qualify as professional employees within the definition. *Greenhorne & O'Mara, Inc.*, supra; *Arizona Public Service Co.*, 310 NLRB 477, 481 (1993). Although employee background is examined for the purpose of deciding whether the work of the group satisfies the “knowledge of an advanced type” requirement of Section 2(12)(a), it is the character of the work required rather than the individuals’ qualifications that determine professional status. *The Express News Corp.*, supra at 628; *Western Electric Co., Inc.*, 126 NLRB 1346, 1348-1349 (1960). An employer’s requirement that all of its employees in a classification have an advanced degree in the field to which the profession is devoted would be persuasive evidence that the employees are professionals, but such evidence is not necessarily conclusive. Professional employee status turns on the degree of judgment required of the employees in applying the knowledge acquired through a prolonged course of study in specialized schooling. *Aeronca, Inc.*, 221 NLRB 326, 327 (1975). Further, while an employee’s academic or other qualifications are relevant to this determination, the controlling factor is generally the nature of the work the employee performs. *Ohio St. Legal Services Ass’n*, 239 NLRB 594 (1978). Expertise gained through limited, technical coursework does not rise to the level of advanced knowledge requiring a prolonged course of

instruction at an institution of higher learning. *Ohio St. Legal Services Ass'n*, at 595-96; *Taft Broadcasting Co.*, 226 NLRB 540 (1976). Furthermore, a position that requires only a general college education is not professional. *Express-News Corp.*, supra at 629-30 (1976). And even when a specialized job function is performed primarily by persons with advanced degrees in the field, if the work is routine, the job is not professional. *A.A. Mathews Assocs.*, 200 NLRB 250, 251 (1981). Salary is not determinative of professional status. *E. W. Scripps Co.*, 94 NLRB 227, 240 (1951).

Further, in order to qualify as a professional, an employee must perform work of a predominantly intellectual and varied character, involving the consistent exercise of discretion and judgment. The Act defines a professional employee in terms of the work performed rather than in terms of individual qualifications. The work must be of such a character that the output cannot be standardized in relation to a given period of time, and it must require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital. *Avco Corp.*, 313 NLRB 1357 (1994). The Board held in *Avco Corp.*, supra, that, although educational background does not control, the Board examines educational background for the purpose of deciding whether the work of the group satisfies the "knowledge of an advanced type" requirement. If a group of employees consists primarily of individuals with professional degrees, the Board may presume that the work requires "knowledge of an advanced type," even though there may be some individuals in the group who do not have a professional degree. Conversely, if few in the group possess the appropriate degree, it follows that the work does not require the use of advanced knowledge. I will apply these basic principles to determining the status of the disputed professional classifications.

During the course of the hearing the parties stipulated that the following individuals are professional employees within the meaning of Section 2(12): Rosemary Ampuero, director of student activities; Jennifer Blum, psychiatric consultant; Alana Klein, director of publications and communications; Timothy Lynch, grant writer; Luciano Mazzella, system administrator; Ngan Ng, financial analyst; Rosanna Rivera, financial aid technician advisor; Anita Rivers, assistant registrar; Christina Rosado, financial aid counselor; James Sham, systems manager; Kevin Smith, HEOP counselor/coordinator; Xiaolei Tang, staff accountant; Randi Torstenson, counselor; Peter Travaglione, Sr., system programmer developer; and John Walter, director of systems applications.

In addition to the above-mentioned stipulations, the parties, while not reaching a stipulation, took the same position regarding the following titles in their briefs. I will apply the basic principles outlined above to determine the status of these classifications.

Heather Wotton, associate director of academic advisement, coordinates all advisement activities for students, including a mandatory first-year mentoring course which she developed. In addition to teaching the course, Ms. Wotton selects the faculty and adjuncts who will teach this course, reviews student assessments of the professors, and determines which faculty to invite to teach for the following year. Diana Nash, the director of career development and internships, conducts student development workshops and oversees career counseling, employer outreach, internships, and student employment. Lisa Moalem, the associate director of the first year experience, provides leadership and coordination of first-year experience, including orientation, academic advisement and first-year social activities. She counsels or refers students on academic, social, or psychological issues that may arise in their first year. Moalem attends weekly meetings with Misty Beasley, director of resident life, and Brian Quigley, director of counseling and psychological services, to discuss transitional issues that arise in first year student's experience. Nakimuli Torkornoo, director of transfer student advisement, advises transfer students and international students on academic issues. She also evaluates all requests to transfer college credits and runs the orientation program for transfer students.

The Board, in *Northeastern University*, 218 NLRB 247 (1975), found that employees in the counseling and testing center of that university were professional employees. Those employees tested and counseled students regarding their program of studies. While the parties here did not stipulate that any of these four employees, whose duties and responsibilities are all geared to advising students on their academic issues, are professionals, their work is similar to the work of the career counselors involved in *Northeastern University*, supra. Accordingly, I find based on the record evidence that Wotton, Nash, Moalem and Torkornoo are professional employees within the meaning of Section 2(12) of the Act.

Similarly, Dahlia Henry, the coordinator of health and wellness, is a professional employee within the meaning of the Act. Henry has two masters' degrees in science and a doctorate in health education. She has a detailed knowledge of the NYS department of health regulations and federal privacy laws, provides one-on-one counseling to students on health issues, and educates students regarding these topics during orientation and the first year mentoring program. Henry has multiple advanced degrees and, while that is not determinative of professional status in and of itself, it is a factor to be considered. The counseling performed by Ms. Henry clearly requires advanced knowledge of an advanced type and I find that this individual is a professional employee within the meaning of Section 2(12) of the Act.

Further, Jacquelyn Bonomo, the assistant director of academic access, is a professional employee within the meaning of the Act. She works with learning disabled students to help them realize their full academic potential. She also advises the program students on course selection. Bonomo identifies students

who are academically at risk and conducts workshops on reading and test taking skills which are open to the entire student body. She spends most of her time directly working with special needs students assisting them with their special learning requirements and advising them in their academic work. I agree with the parties that there is a sufficient record basis to conclude that Bonomo is a professional within the meaning of the Act. .

Elaine Vukov, director of summer and winter programs and study abroad, is a professional employee. The position description states that a Masters' degree and three years experience with program development is required. Vukov works with faculty to develop and advertise the study abroad program. She also worked with representatives at other international universities to expand the program. I note the parties' agreement in their briefs, as well as, the significant amount of advanced learning that is required for this individual to properly evaluate the college-level course material. Accordingly, based on all of the above, the director of summer and winter programs and study abroad, is a professional within the meaning of Section 2(12) of the Act.

Krystof Zaba, director of international recruitment, and evaluates the files of prospective international students and determines admission. He recruits students from local consulates in NYC and has expanded the program to include advertising that targets specific markets such as Southeast Asia and Turkey. He is the designated school official to ensure compliance with immigration requirements for foreign students. Zaba also determines the recipients of a \$5,000 scholarship. Zaba submitted the content for an international student brochure to a superior for approval. Zaba can edit the material on the web. He also developed college-wide cultural sensitivity programs and international education week. Contrary to the parties' positions in their briefs, I cannot find a basis on this record to conclude that Zaba's position meets the narrowly drawn definition of a professional employee. The Board has held that where an employee's work is governed by precise formulas and programs which they do not establish, and that they engage in no research and development nor perform any quality assurance tests, such positions do not fall within the definition of professional within the meaning of the Act. *Technicolor Graphic Services, Inc.*, 253 NLRB 569, footnote 1, 572-573, (1980); cf., *The Firestone Tire & Rubber Company*, 181 NLRB 830 (1970). All of the duties of Mr. Zaba, while highly responsible and important, are insufficient for me to find that he is a professional employee as defined in Section 2(12) of the Act.

The professional status of Suzanne Mulvihill, manager of the annual appeal plans, was not the subject of a stipulation, although the parties in their briefs indicate they would both find this position to be professional as defined in the Act. Mulvihill coordinates and implements aspects of the annual fund program. She is in charge of direct mail, phonathons, a senior class gift campaign, and a parents' fund. She recruits and oversees volunteers or students who gather data and make the phone calls for the phonathon; she coordinates the dinner and determines gifts for the volunteers. The Employer

asserts that Mulvihill replaced the director of the annual appeals and that the former director was an acknowledged professional within the meaning of Section 2(12) of the Act. The Employer further asserts that while Mulvihill's predecessor had a different title, she essentially performs the same work.

A review of the record fails to establish that the duties of Mulvihill's position requires knowledge of an advanced type or is of a purely intellectual nature. Neither the title she has, nor her pay grade is relevant to a determination of her status as a professional within the very limited definition of the Board. The Board focuses on the work done by the individual in the position. Based on this record, I cannot conclude that overseeing discrete aspects of the annual fund program would make the position professional. Fundraising by the Employer appears to be an ongoing process which has a clearly defined program. The Board has held that even when a specialized job function is performed by persons with advanced degrees in the field, if the work is routine, the job is not professional. *A.A. Mathews Assocs.*, supra at 251 (1981).

Finally, with respect to the following classifications, the parties are in disagreement.

The Employer, contrary to Petitioner who took no position, asserts that Joel Leguerre is a professional employee. The record by the Employer's own admission is scant regarding Leguerre, who was hired during the course of the hearing. The Employer asserted that the record regarding his predecessor Fanny Perez would apply to Leguerre. As the assistant director for student accounts in the Center for student services, Leguerre reports to the director of student financial services, Maria De Innocentiis. The job description for this position states that the assistant director for student accounts is responsible for the day-to-day administration of student accounts receivables, including invoicing, collections, processing student cash receipts, student refunds and related accounting operations. A BA degree in business is required for this position. The facts on this record regarding this position establish that a technical knowledge of bookkeeping practices is required. There is no question that this position is a responsible one. However, it is evident that this is not a position that requires a certified public accountant.

The Employer relies on *Group Health Association Inc.*, 317 NLRB 238 (1995). That case involves medical technologists, many of whom possess both M.S. and Ph.D. degrees. I have not found this case helpful in resolving this issue. The Employer also relies on *Western Electric Company, Incorporated*, 126 NLRB 1346 (1960). This case involves the disputed professional status of certain employees who perform the same duties as those who are professional licensed engineers. This case stands for the long-held Board principle that professional status depends not on the education level of the employee or his or her title, but rather on the nature of the work they perform.

The Board held in *Texaco Port Arthur Federal Credit Union*, 315 NLRB 894 (1994), that the work of loan officers fails to meet the criteria found in Section 2(12) of the Act as the loan officer's work was not "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work." If any of the assistant director of student accounts' work is intellectual and requires the exercise of discretion and [Section 2\(12\)](#) judgment, there is no recitation of whether such duties comprised a major portion of their work. [Twin City Hospital Corp.](#), 304 NLRB 173 (1991). Further, the Employer failed to detail the duties of the assistant director of student accounts to establish it is not regularly recurrent and routine. [Willett Motor Coach Co.](#), 227 NLRB 882 (1977). Based on the record herein, I find that the assistant director of student accounts does not perform duties that satisfy the Board's narrow definition of a professional employee.

Campaign associate, [Catherine Moutoussis](#), whom the Employer would classify as a professional employee within the meaning of Section 2(12) of the Act, is in dispute. Campaign director, Jean Wilhelm works with campaign associate, Moutoussis. Contrary to the Employer's assertion that Moutoussis exercises independent judgment and discretion in selecting potential donors, the record indicates that Wilhelm prioritizes her research on potential donors. In that regard, Moutoussis works two days per week analyzing the philanthropic capacity of donors. She works with database specialist, Matt Estay to retrieve information regarding a donor's ability to give a substantial gift to the college and she interprets the data and uses her personal contacts to strategize on how to effectively contact donors for gifts. This responsibility is clearly an important one to the Employer but that does not mean that the duties of this position fall within the clearly defined and narrow definition of a professional employee within the meaning of the Act. Based on this record, the duties of the campaign writer do not fall within the definition of a professional employee within the meaning of Section 2(12) of the Act.

The Employer, contrary to Petitioner, asserts that assistant manager of external affairs, [Abigail Talcott](#), and communications assistant, [Morgan Shada](#), are professional employees within the meaning of Section 2(12) of the Act. Although the parties stipulated that Talcott and Shada are employees, the Employer argues that they should vote as professionals. Talcott is the communications liaison between the Employer's lobbyists and governmental agencies regarding public grants. She is also the liaison with the Employer's public relations representative. Regarding budget, Minson asks Talcott to run an accounting and make recommendations on how to move money between three budget lines. Vice-president Minson, however, determines whether or not to transfer the money and fund an initiative. Shada writes articles for the college's e-newsletter, the alumni magazine, and internal communications to faculty. She edits, researches and fact checks for articles. Shada also deals with vendors relating to design and printing of certain materials. As an example, Shada will

work with print and design vendors to create and mail invitations for the Bedford Hills fundraiser.

Based on the record, I cannot conclude that either of these two employees' positions satisfies the requirements of Section 2(12) of the Act and I therefore conclude that neither position is held by a professional employee. Talcott appears from the record to be a very capable employee with knowledge of the grants awarded to the Employer. She also appears to be able to make recommendations on the budget. She handles public relations writes statements that are sent to the Employer's public relations firm. Notwithstanding the importance of these duties, none of them appear to satisfy the statutory test for finding professional status. Similarly, Shada appears to perform a valuable job for the Employer but none of the above-mentioned duties rise to the type of advanced and intellectual level required for a professional employee within the narrowly defined parameters of Section 2(12) of the Act.

With respect to vacant research position, the Employer acknowledges no testimonial or documentary evidence was presented. It argues, nonetheless, that if this position were filled, "it would go without saying" that this employee would do research involving statistical analyses of hard data that was harvested from the Employer's complex computer and thus, this employee would be doing work of the type that would require the use of independent judgment. The Employer contends, therefore, that this researcher would be deemed to be a professional employee. Such theoretical and speculative evidence is not sufficient for me to make a finding that this position will necessarily be filled by a professional employee and I decline to do so.

Petitioner, contrary to the Employer, contended that several employees were professional employees, including Zinovia Abatzis, chemical hygiene officer. Abatzis has a bachelor's degree in biology and various state issued certificates that are required for chemical laboratories that handle hazardous materials. She maintains a database of the material safety data sheets in accordance with OSHA regulations. She makes certain that chemicals are properly handled and safely stored and is the only employee with certain certificates. She also coordinates the disposal of chemical waste with an approved chemical waste removal company and updated the College's chemical hygiene plan. As the lab supervisor, Abatzis ensures the lab's compliance with OSHA and local fire and hazardous waste regulations. She also assists faculty while the students conduct experiments during class time and checks that students are wearing the proper protective wear.

The Board has found laboratory employees to be professionals when they determine which tests to perform, improvise test methods, or perform complicated or detailed analyses. Employees who perform routine tests following set procedures normally are viewed as non-professional, technical employees – i.e., employees who do not meet the definition of professional, but

who perform work of a technical nature involving the use of independent judgment and requiring the exercise of specialized training typically acquired in technical schools or through special courses. *Barnert Memorial Hospital*, 217 NLRB 775, 782-783 (1975); *Ohio Ferro-Alloys Corp.*, 107 NLRB 504 (1953); *Swift & Company*, 98 NLRB 746 (1952); *Union Oil Company of California*, 88 NLRB 937 (1950); *Colorado Milling and Elevator Co.*, 87 NLRB 1091 (1949). A review of this record fails to establish that Abatzis has job duties that would mandate a finding that she is a professional employee within the meaning of Section 2(12). This record establishes that Abatzis is in effect a compliance officer with highly sophisticated technical expertise in dealing with hazardous materials. However, such skills and ability fall short of the narrow definition of professional employee in Section 2(12).

Petitioner asserts, contrary to the Employer, that Susan Ach, Stacy Benick, and Shandra Edmeade, part-time academic advisors, are professional employees within the meaning of the Act. To the extent that the part-time employees assist Nash, Torkornoo and Wotton in their professional work advising students, I conclude that the duties and responsibilities of the part-time academic advisors satisfy the definition of a professional employee within the limited definition of the Act.

The record is unclear as to the position the Employer takes on the professional status of Christian Rubio, payroll coordinator. Petitioner contends that the payroll coordinator is not a professional employee within the meaning of the Act. The record establishes that Rubio's duties include coordinating with the Employer's payroll service and prepares some of the tax forms. When informed of a termination, she calculates any payments due to the employee. In its brief, the Employer makes no specific argument that the payroll coordinator is a professional employee within the limited definition of the Act. Based on the record herein, I cannot conclude that the payroll coordinator is a professional employee under Section 2(12) of the Act.

Contrary to Petitioner, the Employer urges that Ross Chappell, operations director of FAPA is a professional employee under the Act. The record establishes, however, that Chappell's job entails the maintenance and functioning of theater space. Under his superior's direction, he has obtained quotes from various vendors for the repair or upgrade of theater equipment, such as the installation of new soundproof doors. He is invited to FAPA faculty meetings, inasmuch as, many issues in the division involve the facilities. Nothing on this record suggests that Ross Chappell's duties satisfy the statutory definition set forth in Section 2(12) of the Act. In order to find professional status, the Act requires evidence that the employee in issue engages in work requiring, inter alia, "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital" Clearly this position involving the operation of theatre space is not of the type or character envisioned by

Congress is passing the Act. Based on this record and the argument of the parties, the operations director of FAPA is not a professional employee within the limited definition of the Act.

Finally, the Employer contends that Jennifer Chappell, administrative assistant to the vice-president for student affairs and enrollment management, is a professional employee under the Act. Petitioner disagrees. I note that the position is currently vacant. The record demonstrates that Chappell provided the typical administrative assistant functions and appears to have been an efficient and dedicated aide to a high level official of the Employer. However, absolutely nothing in this record establishes that this position is a professional within the limited parameters of the statute. Clearly, this position is not of the type or character envisioned by Congress is passing the Act. Based on this record and the argument of the parties, the administrative assistant to the vice-president for student affairs and enrollment management is not a professional employee within the limited definition of the Act.

IV. CONCLUSION

Accordingly, I therefore find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

If a majority of the employees in the professional voting group (b), *infra*, indicate a choice to be included in a unit with the non-professional employees, the following employees will constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer; but excluding all full-time and part-time faculty, field maintenance employees, and confidential employees, guards, and supervisors as defined in the Act.

If, on the other hand, a majority of the employees in the professional voting group (b), *infra*, do not vote for inclusion, the following two groups of employees will constitute separate units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

(a) All full-time and regular part-time non-professional employees employed by the Employer; but excluding all full-time and part-time faculty, field maintenance employees, and confidential employees, guards, professional employees, and supervisors as defined in the Act.

(b) All full-time and regular part-time professional employees employed by the Employer; but excluding all full-time and part-time faculty, field maintenance employees and confidential employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time³⁹ and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.⁴⁰ Eligible to vote are those in the unit who were employed for an average of four hours per week during the calendar quarter immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁴¹ Those eligible shall vote on

³⁹ Pursuant to Section 101.21 of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

⁴⁰ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

⁴¹ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **February 21, 2008**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. In the event the

whether or not they desire to be represented for collective bargaining purposes by the New York State United Teachers, American Federation of Teachers, AFL-CIO.⁴²

Dated at New York, New York
February 14, 2008

Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Petitioner notifies me that it does not wish to proceed to an election in the unit found appropriate, the election eligibility list will not be provided to Petitioner.

⁴² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **February 28, 2008**. The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.